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## COMMENTS

### NEW YORK'S POST-SEPTEMBER 11, 2001 RECOGNITION OF SAME-SEX RELATIONSHIPS: A VICTORY SUGGESTIVE OF FUTURE CHANGE

*John O. Enright\**

#### INTRODUCTION

Larry Courtney lost in the World Trade Center attacks the partner with whom he had lived and shared his life for more than thirteen years.<sup>1</sup> Like any individual losing a partner, Mr. Courtney immediately was forced to confront not only the emotional impact but also the financial reality of supporting himself without a partner's help. In the event of tragedies such as the World Trade Center attacks, however, federal and state governments provide victims' family members with a certain financial safety net in the event of a death of a spouse. This safety net includes, among other benefits, workers' compensation payments when a husband or wife dies on the job and crime victim awards when a spouse dies as a result of a criminal act. Unfortunately for Mr. Courtney, he lost not a wife but his male partner.<sup>2</sup> Consequently, his thirteen-year relationship was invisible under the law and he had no right to the governmental support available to similarly situated married couples.

Nonetheless, Mr. Courtney made a claim for workers' compensation benefits from his insurance carrier with the hope that the carrier would treat him as if he were a husband who had lost his wife. The insurance carrier, which defers to the New York State Workers' Compensation Law to determine eligibility,<sup>3</sup> denied his claim.<sup>4</sup> Undeterred, he went on to challenge the New York Workers'

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\* J.D. Candidate, 2005, Fordham University School of Law. Many thanks to Professor James E. Fleming for all of his help and guidance. I would like to further thank my parents, John and Rosemary Enright, for their unending support.

1. See Robert F. Worth, *Gay Man to Seek Benefits for Loss of Companion on Sept. 11*, N.Y. Times, Apr. 23, 2002, at B7.

2. *Id.*

3. N.Y. Workers' Comp. Law §§ 1-430 (McKinney 1992 & Supp. 2004).

4. See Worth, *supra* note 1.

Compensation Law on the grounds that it should apply not only to survivors who lost spouses but to same-sex survivors too.<sup>5</sup> His claim and his insurer's refutation subsequently became moot when the New York State Assembly and Senate unanimously passed an amendment to the Workers' Compensation Law, making eligible for workers' compensation benefits the "domestic partners" of victims of September 11, 2001.<sup>6</sup>

Mr. Courtney's story is striking not only because of the inequitable law he initially faced, but more so because of the New York State legislature's response. Specifically, the legislature's amendment marked the first time a "domestic partner" was recognized under New York State law.<sup>7</sup> Stories such as Mr. Courtney's demonstrate how September 11, 2001 altered the American legal landscape for same-sex couples. One need only look at legislative and judicial responses in the fields of tort,<sup>8</sup> criminal,<sup>9</sup> and workers' compensation law,<sup>10</sup> among others, to recognize the undeniable impact of the terrorist attacks on our law. In the aftermath of the attacks, legislation at all governmental levels, affecting multiple areas of the law, was passed. Among the most immediate challenges, lawmakers sought to address the needs of victims' families and, in doing so, were confronted directly with the realities faced by certain families who were, in many

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5. *Id.*

6. 2002 N.Y. Laws 467 (codified at N.Y. Workers' Comp. Law § 4 (McKinney Supp. 2004)). The Empire State Pride Agenda ("ESPA") heralded its passage:

This law along with several other 9/11-related measures that were unanimously approved this year by the legislature represent the first time that domestic partners have been recognized in any context whatsoever under New York State law," said [Joe] Grabarz [Executive Director of the Empire State Pride Agenda]. "Getting lawmakers to this point has been a long process of education and grassroots advocacy by the lesbian and gay community from across the state. We hope this is just a beginning and will be working with legislators to see that our families and relationships receive additional support in the future."

Press Release, Empire State Pride Agenda, New NY State Law Giving Spousal Benefits to Gay Partners of 9/11 Victims Is a 'Significant Step Forward,' But Gay Families Still Unprotected in Tragedies (Aug. 21, 2002), at <http://www.prideagenda.org/pressreleases/pr-8-21-02.html>. Previously, Governor Pataki had indefinitely suspended the statutorily imposed obligation of providing an employer notice of the injury or death within thirty days of such injury or death. Exec. Order No. 113.35, 2001 N.Y. St. Reg., No. XXIII, at 87.

7. 2002 N.Y. Laws 467 (codified at N.Y. Workers' Comp. Law § 4).

8. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. §§ 40101 note, 44302-44306 (Supp. 2001)).

9. The Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of U.S.C.).

10. See, e.g., September 11th Victims and Families Relief Act, 2002 N.Y. Laws 73 (codified at N.Y. Workers' Comp. Law § 29(1-b) (McKinney Supp. 2004), N.Y. Est. Powers & Trusts Law § 11-4.7(e) (McKinney Supp. 2004), N.Y. Surr. Ct. Proc. Act § 205(3) (McKinney Supp. 2004); N.Y. Surr. Ct. Proc. Act § 2307(2) (McKinney Supp. 2004)).

ways, completely invisible under the eyes of law: same-sex couples. The reality of these families' needs spurred lawmakers to begin to correct the inequities they faced.

Traditionally, same-sex couples, because of the inability to legally marry, have been denied most, if not all, of the benefits available to married couples.<sup>11</sup> These benefits, such as automatic spousal eligibility for health insurance, recognition under intestacy laws, and the right to assert wrongful death actions, among others, become even more crucial in the event of tragedy.<sup>12</sup> Legislators' actions following the terrorist attacks of September 11, 2001, particularly in New York, were noteworthy in that they made the surviving partners of same-sex couples eligible for substantial federal and state awards, including workers' compensation payments, crime victim awards and disaster relief funds, normally available only to spouses and other family members.<sup>13</sup> In sum, this legislation marked a change in the legal treatment of same-sex couples and, potentially, a more general change in perception of the problems they face.

These substantial changes have not gone unnoticed. One gay and lesbian rights organization proclaimed that the new New York laws constituted the "first time that domestic partners have been recognized in any context whatsoever under New York State law."<sup>14</sup> Another individual claimed that certain federal legislation produced a change in the "political climate and it's hard to imagine totally turning back the clock."<sup>15</sup> Similarly, others asserted, "[t]his is the first time the federal government has recognized a same-sex relationship this way."<sup>16</sup> It is clear that a significant turn has been made.

New York State legislation passed in response to September 11, 2001, coupled with advancements at the federal level, marks a significant change in the treatment of same-sex couples. While there was some precedent supporting the increased legal protection of same-sex couples, the stories told by the same-sex survivors of victims

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11. See, e.g., Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 Colum. L. Rev. 1164, 1167-68 (1992); Nancy K. Kubasek et al., *Fashioning a Tolerable Domestic Partners Statute in an Environment Hostile to Same-Sex Marriages*, 7 Law & Sexuality 55, 66-72 (1997).

12. See *infra* Part I.A.

13. See *infra* Part I.C.

14. See Press Release, Empire State Pride Agenda, *supra* note 6 (quoting Joe Grabarz, Executive Director of the Empire State Pride Agenda).

15. Jane Gross, *U.S. Fund for Tower Victims Will Aid Some Gay Partners*, N.Y. Times, May 30, 2002, at A1 (quoting Lee M. Miringoff, Director of the Marist College Poll).

16. See Press Release, Lambda Legal Defense Fund, *Federal Government Awards Survivor Benefits to Lesbian Whose Partner Was Killed in 9/11 Attack; Lambda Legal Says Recognition Is First of Its Kind* (Jan. 23, 2003) (quoting Jennifer Middleton, Lambda Legal Staff Attorney), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1193>.

exposed the inequities they face. This Comment argues that such storytelling likely played a role in influencing lawmakers' responses to September 11, 2001. Further, in light of applicable theories about legal and social movements, the stories told were persuasive and can—and should—be used in the future to compel similar lawmaking. Part I begins by discussing the traditional treatment of same-sex couples under federal and state law. Part I.B. focuses on the traditional treatment of same-sex couples in New York State. Part I.C. discusses the legislation passed in response to September 11, 2001 and how it treated same-sex survivors of victims as if they had lost married spouses. Part I.D. discusses how commentators debated the post-September 11, 2001 lawmaking and the stories they used to advance their arguments. Part II.A. discusses the role of storytelling in legal scholarship and the important role it has played for advocates of gay and lesbian rights. In the September 11, 2001 context, the public, including lawmakers, heard compelling stories from same-sex survivors about how they are mistreated under the law. Part II.B. explores the potential long-term effects of the New York State legislation, and limited federal recognition, using theories developed to gauge how socio-legal change occurs. The inquiry is aided by asking how social movements have changed in response to other tragedies and how subsequent political opportunities furthered their causes. Part III applies the theories of storytelling and social change introduced in Part II to argue that emotional events such as September 11, 2001 can play an important part in persuading lawmakers to recognize same-sex couples under the law. Part III further argues that, when compared to analogous social movements from the past, the unique circumstance of September 11, 2001 raised awareness of the reality of same-sex couples' lives and the injustices they faced under existing law, thus leading to legal transformations that are likely to be sustained and expanded.

#### I. SAME-SEX COUPLES ARE LEGALLY DISADVANTAGED RELATIVE TO MARRIED HETEROSEXUAL COUPLES

The number of unmarried, co-habiting couples has risen dramatically in the United States over the past thirty years.<sup>17</sup> This

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17. See Yuval Merin, *Equality for Same-Sex Couples* 190 (2002). The United States Census Bureau's 2000 census estimates that unmarried couples constitute about 9% of all "coupled households" and same-sex couples account for about 1% of all coupled households. See U.S. Census Bureau, *Married-Couple and Unmarried Partner Households: 2000*, at 3 (2003) ("A reflection of changing lifestyles is mirrored in Census 2000's enumeration of 5.5 million couples who were living together but who were not married, up from 3.2 million in 1990 . . . [A]bout 1 in 9 (594,000) had partners of the same sex."), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>. Commentators argued that the figures would help sway public opinion. *Households Headed by Gays Rose in the 90's, Data Shows*, N.Y. Times, Aug. 22, 2001, at A17 ("The census figures will change the debate for many Americans from an

increase has occurred concomitantly for both heterosexual couples who have the ability to marry and same-sex couples who do not.<sup>18</sup> While many married couples might take for granted those rights afforded to them by virtue of their relationship, the rising number of unmarried couples—whether by choice or not—are often all too aware of what privileges they lack. Part I.A. sets forth and analyzes the rights and benefits attributable to marriage. It then highlights a few of the rights that become particularly valuable—and necessary—in the event of the death of a spouse.

### A. Legal Rights Attributable to Marriage

Same-sex couples are legally disadvantaged relative to married couples.<sup>19</sup> Marriage-dependent rights that same-sex couples do not benefit from include: parenting rights;<sup>20</sup> rights allowing a partner to act as a guardian of the other in the event of hospitalization;<sup>21</sup> the right to adopt children;<sup>22</sup> prioritization in claiming human remains;<sup>23</sup> the

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abstract controversy read about in newspapers or seen in noisy debates on television to a discussion about real families, real people and real lives.” (quoting David Smith of the Human Rights Campaign)).

18. See Merin, *supra* note 17, at 190.

19. See *id.* at 197-236; David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 Mich. L. Rev. 447 (1996); Dee Ann Habegger, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent Upon Sexual Orientation?*, 33 Ind. L. Rev. 991, 998-1001 (2000); Kubasek, *supra* note 11, at 66-72; Arthur S. Leonard, *Legal Recognition of Same-Sex Partners Under US State or Local Law*, in *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* 133, 134-52 (Robert Wintemute & Mads Andenaes eds., 2001). One exception is Vermont’s Civil Union law, where same-sex couples entering into civil unions are given the same rights as married couples. See *infra* note 93, 137-42 and accompanying text. Even those same-sex couples who benefit from a domestic partnership registry or ordinance remain disadvantaged. See *infra* Part I.B.2.

20. The quest for parenting rights is one of the many battles being fought and, like all other rights being sought, parenting rights host their own particular complexities and problems. See, e.g., Ryiah Lilith, *Caring for the Ten Percent’s 2.4: Lesbian and Gay Parents’ Access to Parental Benefits*, 16 Wis. Women’s L.J. 125 (2001) (highlighting the particular problems facing gay and lesbian parents and the consequent need for substantive legal rights).

21. See Chambers, *supra* note 19, at 454-55. The most well known example is the case of Sharon Kowalski. After being critically injured in an automobile accident, Kowalski’s father and female partner, Karen Thompson, both sought to act as Kowalski’s sole guardian. Kowalski’s father, who did not recognize his daughter’s relationship, sought to terminate Thompson’s guardianship and the Minnesota Court of Appeals agreed, terminating the guardianship and further terminating any hospital visitation rights. See *In re Guardianship of Kowalski*, 382 N.W.2d 861, 863 (Minn. Ct. App. 1986).

22. See generally John G. Culhane, *A “Clanging Silence”: Same-Sex Couples and Tort Law*, 89 Ky. L.J. 911, 931-36 (2001) (arguing that because sexual relations are not at issue in same-sex adoption cases, as opposed to same-sex marriage cases, courts are more willing to extend rights in the former but never in the latter); Timothy E. Lin, Note, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 Colum. L. Rev. 739, 768-69 (1999) (noting that the

right to help provide citizenship to a non-American partner;<sup>24</sup> government-provided benefits, such as social security and workers' compensation;<sup>25</sup> employer-provided benefits, such as health insurance and bereavement leave;<sup>26</sup> benefits in bankruptcy proceedings;<sup>27</sup> tax benefits;<sup>28</sup> standing for certain tort actions;<sup>29</sup> housing rights;<sup>30</sup> property rights granted through state-created intestate succession laws;<sup>31</sup> and divorce rights, such as the ability to receive, or the obligation to provide, spousal support and alimony.<sup>32</sup> Even a perfunctory look at these benefits evidences same-sex couples' disadvantages relative to married heterosexual couples.

The inequity of a committed same-sex couple's lack of marriage-dependent benefits is amplified in the event of tragedy, when many rights available to heterosexual widows and widowers become critically important.<sup>33</sup> Three legal rights that are particularly salient in

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legal status of same-sex adoption varies by jurisdiction).

23. See Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 Temp. L. Rev. 31, 47 (2002) (recognizing that the personal representative of a decedent's estate often dictates how the decedent's remains will be handled).

24. See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).

25. See *Bowman & Cornish*, *supra* note 11, at 1167.

26. See generally Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less than Perfect Institutional Choice*, 7 Temp. Pol. & Civ. Rts. L. Rev. 337 (1998) (discussing the implications and limitations of market-based domestic partnership benefits).

27. See A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 Fordham L. Rev. 69, 103 (1998) (arguing for a revision of the bankruptcy system "to ensure that it awards benefits based on the economic, rather than the marital, relationship between two individuals").

28. *Id.* at 88. For an early analysis of the tax consequences stemming from employer-granted benefits, see Jarrett Tomás Barrios, Note, *Growing Pains in the Workplace: Tax Consequences of Health Plans for Domestic Partners*, 47 Tax Law. 845 (1994).

29. See generally Culhane, *supra* note 22.

30. The Fair Housing Act does not bar discrimination in housing based on sexual orientation. 42 U.S.C. §§ 3601-3631 (2000).

31. See Knauer, *supra* note 23, at 43-44.

32. See William N. Eskridge, Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* 793 (1997); Kubasek, *supra* note 11, at 66-67. For an argument in favor of "divorce" rights for domestic partners, see Jessica A. Hoogs, Note, *Divorce Without Marriage: Establishing a Uniform Dissolution Procedure for Domestic Partners Through a Comparative Analysis of European and American Domestic Partner Laws*, 54 Hastings L.J. 707 (2003) (proposing a uniform "divorce" procedure based on international sources and Vermont's civil union provisions). Vermont's civil union law gives the state's family courts the same jurisdiction over the dissolution of civil unions as it does marriages. Vt. Stat. Ann. tit. 15, § 1206 (2002); see also Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 Vt. L. Rev. 15, 43 (2000) (noting that "[t]his is a first in America").

33. See Denny Lee, *Partners of Gay Victims Find the Law Calls Them Strangers*, N.Y. Times, Oct. 14, 2001, § 14, at 4. It is important to mention that although this Comment discusses the lack of rights accorded to same-sex couples, and only touches upon similar effects to unmarried heterosexual couples, the latter group's problems

the event of a disaster are: (1) the right to a distribution of property under probate law, (2) delegation of health care and monetary benefits from public and private sources, and (3) the right to damages payable under states' wrongful death statutes. In the absence of legislation providing same-sex couples treatment equal to that of married couples—and with respect to probate law, the lack of a will designating a same-sex partner as a beneficiary—same-sex partners are not considered the “spouse” of a victim and are prevented from recovering accordingly.<sup>34</sup>

### 1. Probate Law

Probate law governs and defines the distribution of a decedent's assets at death.<sup>35</sup> Such distribution is made either (1) in accordance with a will or (2) in the absence of a will, in accordance with the applicable state's intestacy laws.<sup>36</sup> The latter include statutorily defined default family members to whom a decedent's property will be distributed upon death.<sup>37</sup> Most of these statutes are based, at least in part, on the Uniform Probate Code,<sup>38</sup> and with the exception of Hawaii,<sup>39</sup> Vermont,<sup>40</sup> and California,<sup>41</sup> no state includes same-sex, committed partners as beneficiaries.<sup>42</sup> From this vantage point, a

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are similar in many respects. For an insight into the parallels felt by widowed fiancées after September 11, 2001, see Shaila K. Dewan, *No Dress, No Vows, and Less Status in Grief*, N.Y. Times, Jan. 22, 2002, at A1.

34. See Knauer, *supra* note 23, at 41-53.

35. Jesse Dukeminier & James E. Krier, *Property* 325-26 (4th ed. 1998).

36. See Knauer, *supra* note 23, at 41-46. In 1993, the New York Supreme Court, Appellate Division, Second Department, declined to recognize a surviving same-sex partner as the equivalent of a spouse under the New York state law that grants to a spouse the right to make an election of right against a decedent-spouse's will. *In re Cooper*, 592 N.Y.S.2d 797, 798-99 (App. Div. 1993). The court explained that under New York State law, if a spouse willed away his or her entire estate, such spouse could make a right of election giving him or her one-half of the estate if there were no remaining issue, and one-third of the estate in the event of remaining issue. *Id.* at 798. The court refused to broaden what it felt was the legislature's clear definition of a spouse as a husband or wife. *Id.*

37. See, e.g., N.Y. Est. Powers & Trusts Law § 4-1.1 (McKinney 2002).

38. See Unif. Probate Code, 8 U.L.A. § 1-101 (1993 & Supp. 2003) (amended 2003); Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 Cornell L. Rev. 1492, 1499 (2000).

39. Haw. Rev. Stat. § 560:2-102 (Supp. 2001).

40. Vt. Stat. Ann. tit. 15, § 1204(e)(1) (2002) (granting to civil union partners the benefits “relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property”).

41. Cal. Prob. Code § 6401(c) (2003) (setting forth how property will be distributed to the “surviving spouse or surviving domestic partner”).

42. See Knauer, *supra* note 23, at 41.



surviving same-sex partner is effectively a "mere stranger" under the eyes of the law.<sup>43</sup>

Same-sex couples have the ability to circumvent the pitfalls of state probate law by creating a will that names a same-sex partner as a beneficiary of the decedent's property upon death.<sup>44</sup> Family members, however, can contest wills and they often do when they either do not know about, or disapprove of, the decedent's same-sex relationship.<sup>45</sup>

A same-sex partner's need to be considered a beneficiary of an estate is particularly significant in the September 11, 2001 context, where under requirements established for the federal September 11 Victim Compensation Fund, only one personal representative—usually the primary beneficiary of the estate—may file a claim on behalf of a victim.<sup>46</sup>

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43. *Id.* At least one commentator has argued that the primary goals of intestacy laws include: (1) the distribution of property in a fashion that emulates the distribution the decedent would have chosen had she created a will; (2) the execution of an equitable distribution of property among family members; (3) protecting a financially dependent family by ensuring it collects its share of property; and (4) upholding and encouraging the sanctity of the nuclear family. See Holob, *supra* note 38, at 1499-1501; see also E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 Or. L. Rev. 255, 269-89 (2002) (setting forth four similar values—donative freedom, reciprocity, reliance and ease of administration—that intestacy laws should try to realize). These goals, in part, support past changes in intestacy laws. Specifically, the divergence in the Uniform Probate Code from prior intestacy statutes that often did not leave surviving spouses with a great enough share of the estate. The Uniform Probate Code bequeathed a greater share of the estate to surviving spouses under the rationale that that was what most decedents would have wanted. See Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 Alb. L. Rev. 927, 929 (1992) ("From the beginning, a distinctive feature of the UPC intestate distribution pattern was the increase in the share passing to the surviving spouse."). While legislators draft intestacy statutes to respect a decedent's donative intent by fashioning distribution based on what the decedent probably would have wanted, such statutes actually often limit that freedom by requiring that a minimum percentage of property be given to a surviving spouse. See Holob, *supra*, at 1501. The importance placed on a surviving spouse punctuates the imbalance felt by surviving same-sex partners who may have lived their lives in all regards as a spouse but are now treated as a "stranger."

44. See Knauer, *supra* note 23, at 45; see also Hayden Curry et al., *A Legal Guide for Lesbian and Gay Couples* 5/15-17 (10th ed. 1999) (providing a "how-to" on will preparation, including sample forms).

45. See Knauer, *supra* note 23, at 41-49; Gross, *supra* note 15. Gross's article tells the story of one man who had lived with his now deceased same-sex partner for more than twenty-six years. Because his partner had never legally divorced his former wife, she, along with their financially independent son, would receive his Army pension, Social Security and Workers' Compensation payments. *Id.* For other couples whose families accepted the relationship, directing payment is easier. *Id.*; see also Diana B. Henriques & David Barstow, *Head of Fund Says Families Should State Their Cases*, N.Y. Times, Dec. 22, 2001, at B8 ("Luz Ortiz, the niece of Gloria Nieves . . . was seeking help on behalf of her aunt's 15-year-old son. The boy's mother, although living with a lesbian partner, was married . . . [The niece] was hopeful that . . . the compensation award went to Ms. Nieves's son.").

46. See Susan J. Becker, *Tumbling Towers as Turning Points: Will 9/11 Usher in a*

## 2. Survivor Benefits

Survivor benefits accorded to married couples under state and federal law, and under employer-created programs, come in a number of forms. As previously noted,<sup>47</sup> among others, healthcare benefits, pension funds, life insurance, tax breaks and workers' compensation are all automatically conferred to married spouses.<sup>48</sup> The importance of these benefits is undeniable because healthcare benefits alone constitute a large part of an employee's total compensation package. The total value is heightened when you consider that many of these benefits are, for tax purposes, excluded from the employee's gross income.<sup>49</sup>

The availability of these benefits to a spouse or partner after death depends on who is named as the beneficiary in the applicable insurance policy.<sup>50</sup> While employees with same-sex partners have the ability to name those partners as beneficiaries, problems arise in instances where there is no naming of the beneficiary or the beneficiary form is simply incomplete. In these scenarios, payout will depend on the employer's policy with respect to domestic partners.<sup>51</sup>

While many municipalities and employers allow for the naming of domestic partners as beneficiaries of certain benefits, others do not.<sup>52</sup> Where a payor, such as an insurance company, does not recognize a domestic partner in the same class as a spouse, a default payout (where a beneficiary is not named) cannot be made to a domestic partner, and he or she will receive nothing.<sup>53</sup>

Lastly, federal benefits such as social security are restricted to "spouses" and, under the Defense of Marriage Act,<sup>54</sup> same-sex partners are precluded from being considered spouses.<sup>55</sup>

## 3. Wrongful Death Actions and Survival Claims

Wrongful death actions are tort actions reserved to a certain class of people who survive the death of a spouse or close relative.<sup>56</sup> All states

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*New Civil Rights Era for Gay Men and Lesbians in the United States?*, 9 Wm. & Mary J. Women & L. 207, 233-36, 234 n.138 (2003); Knauer, *supra* note 23, at 47.

47. See *supra* notes 20-32 and accompanying text.

48. See Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & Pol'y 107, 126-30 (1996); Knauer, *supra* note 23, at 49-51.

49. See Knauer, *supra* note 26, at 342-43. Professor Knauer further discusses the tax disadvantages felt by same-sex couples. *Id.*

50. See Knauer, *supra* note 23, at 49-50.

51. *Id.* at 49-51.

52. See, e.g., *infra* notes 108-09 and accompanying text.

53. See Knauer, *supra* note 23, at 49-51.

54. 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000). See *infra* note 143 for a discussion of the Defense of Marriage Act.

55. See Knauer, *supra* note 23, at 49.

56. See Culhane, *supra* note 22, at 955-56.

have wrongful death statutes allowing beneficiaries of victims of negligent or intentional homicides to pursue claims against a tortfeasor to compensate them for their losses.<sup>57</sup> The case law demonstrates that both same sex partners<sup>58</sup> and unmarried heterosexual partners<sup>59</sup> are rarely members of this class of potential beneficiaries. The identification of beneficiaries is made by statute, which either explicitly lists the class of beneficiaries,<sup>60</sup> refers to the state's intestacy statute to determine who is eligible,<sup>61</sup> or a combination of both.<sup>62</sup> In any of these scenarios, same-sex partners are statutorily ineligible in all states except California, Hawaii, and Vermont.<sup>63</sup>

Survival statutes permit the victim's estate to bring tort actions for certain losses experienced by a victim, including injury to tangible property and personal injury.<sup>64</sup> A same-sex partner of a victim may share in a survival recovery only if she is a beneficiary of the partner's estate.<sup>65</sup> This recovery, however, does not compensate the victim's same-sex survivor for her loss.<sup>66</sup> The survivor of a New York victim is particularly limited because a decedent's pain and suffering before death is not compensable under New York State law.<sup>67</sup>

### *B. Nonmarital Relationships Have Gained Limited Legal Recognition*

Part I.A. discussed how unmarried couples are legally disadvantaged relative to married couples. In the event of a partner's

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57. See, e.g., Fla. Stat. ch. 768.16-27 (1997); Ga. Code Ann. § 19-7-1 (1999); Ind. Code § 34-23-1-1, 34-23-2-1 (1998); N.Y. Est. Powers & Trusts Law § 5-4.1 to 5-4.5 (McKinney 2002).

58. Culhane, *supra* note 22, at 967-72; see, e.g., *Raum v. Rest. Assocs., Inc.*, 675 N.Y.S.2d 343 (App. Div. 1998) (holding that the same-sex partner of a decedent does not have a wrongful death claim under the applicable statute, which "operates without regard to sexual orientation, in that unmarried couples living together, whether heterosexual or homosexual, similarly lack the right to bring a wrongful-death action, and, as such, the statute does not discriminate against same-sex partners in spousal-type relationships").

59. Culhane, *supra* note 22, at 957-60.

60. *Id.* at 955-56 nn.209-12.

61. *Id.* at 956 n.213.

62. *Id.*

63. Cal. Civ. Proc. Code § 377.60 (West Supp. 2003) (including "domestic partner" among those persons with standing); Haw. Rev. Stat. § 663-3(b) (Supp. 2001) (including "reciprocal beneficiary" in the list of people who may maintain an action); Vt. Stat. Ann. tit. 15, § 1204(e)(2) (2002) (including "causes of action related to or dependent upon spousal status, including an action for wrongful death" among a nonexclusive list of legal benefits given to parties in civil unions).

64. See, e.g., Ky. Rev. Stat. Ann. § 411.140 (Michie 1998) (allowing for the survival of rights of action for personal injury and injury to real and personal property, but excluding actions for slander); S.C. Code Ann. § 15-5-90 (Law. Co-op. 1976) (allowing for the survival of all personal injuries and personal and real property).

65. See Knauer, *supra* note 23, at 52.

66. *Id.*

67. *Id.*

death, a survivor is left without the monetary support that widowed spouses gain automatically. Part I.B. describes how unmarried same-sex couples, facing these disadvantages, have fought to attain the privileges only available to married couples. Unmarried couples traditionally have sought recourse through both the legislative process<sup>68</sup> and litigation.<sup>69</sup> This section discusses how unmarried couples have sought to attain legal status in certain contexts. A great deal of the progress has been accomplished through the courts.<sup>70</sup>

### 1. Co-Habitational Relationships

The courts' recognition of a couple's unmarried but co-habitational relationship begins with *Marvin v. Marvin*.<sup>71</sup> *Marvin* confronted the issue of whether unmarried but heterosexual couples can privately contract to define their relationships. The California Supreme Court found an express contract between such a couple based on their oral agreement to live together, hold themselves out to others (figuratively) as husband and wife, and share income.<sup>72</sup> The case arose when the defendant-"husband" compelled the plaintiff-"wife" to leave his house, after which he provided support to her for about one and one-half years but, thereafter, ceased making support payments.<sup>73</sup> At that point, the plaintiff brought suit to recover her share of their common property and continuing support payments, under the original oral agreement.<sup>74</sup> The court made clear that when determining whether such an agreement between a co-habiting couple exists, future courts should look to the parties' conduct throughout the co-habitation.<sup>75</sup> Also critical to the court's holding is its announcement that non-marital relationships are not invalid, per se, even though they are sexual relationships existing outside the institution of marriage.<sup>76</sup> The court stated that "[a]greements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services."<sup>77</sup> Consequently, if

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68. See, e.g., *infra* Part I.C.

69. See Leonard, *supra* note 19, at 134-52.

70. See generally Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551 (1993) (providing a historical recount of gay rights litigation).

71. 557 P.2d 106 (Ca. 1976).

72. *Id.* at 110.

73. *Id.*

74. *Id.*

75. *Id.* at 122. ("The courts may inquire into the conduct of the parties to determine whether the conduct demonstrates an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may, when appropriate, employ principles of constructive trust or resulting trust." (citations omitted)).

76. *Id.* at 113 (noting that a sexual relationship, even outside of marriage, does not invalidate agreements between a couple concerning earnings, property, or expenses).

77. *Id.*

the meretricious sexual services are additional to other, good consideration, a court will sever the meretricious sexual services component and uphold the other consideration.<sup>78</sup> Since the ruling, most jurisdictions have followed the express agreement rule,<sup>79</sup> while others have rejected it,<sup>80</sup> and certain others have distinguished it, weakening its import.<sup>81</sup>

The judiciary's recognition of express agreements between cohabiting couples, however, has most often extended solely to heterosexual couples; there are far fewer instances where a same-sex couple's express agreement has been enforced.<sup>82</sup> For example, in *Jones v. Daly*,<sup>83</sup> the California Court of Appeal, Second Division, denied the enforcement of an express cohabitators' agreement between a same-sex couple even though the pair shared their wages, and one party's consideration was to act as a lover, companion, and general partner to the other.<sup>84</sup> Per the *Marvin* decision, the court's rationale turned on its view that the consideration given was meretricious and, therefore, inadequate to enforce an agreement.<sup>85</sup> While the understanding between the parties was almost identical to that in *Marvin*, the court came to the opposite conclusion.<sup>86</sup> While *Marvin*

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78. *Id.* at 114 ("In sum, a court will not enforce a contract for the pooling of property and earnings if it is explicitly and *inseparably* based upon services as a paramour." (emphasis added)); see also Whorton v. Dillingham, 248 Cal. Rptr. 405, 409 (Ct. App. 1988) (holding that chauffeur, bodyguard, secretary, and business partner services comprise adequate consideration independent of sexual services).

79. See, e.g., Kozlowski v. Kozlowski, 403 A.2d 902, 907 (N.J. 1979) ("The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many."); Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980) ("Changing social custom has increased greatly the number of persons living together without solemnized ceremony and consequently without benefit of the rules of law that govern property and financial matters between married couples.").

80. See, e.g., Rehak v. Mathis, 238 S.E.2d 81, 82 (Ga. 1977) ("The parties being unmarried and the appellant having admitted the fact of cohabitation in both verified pleadings, this would constitute immoral consideration under [the Georgia Code]."); Hewitt v. Hewitt, 394 N.E.2d 1204, 1207-11 (Ill. 1979) (declining to follow *Marvin* on public policy grounds and reasoning that recognition of such relationships is better left to legislative determination).

81. For example, Minnesota and Texas require such a cohabitation agreement to be in writing. Minn. Stat. Ann. §§ 513.075-76 (West 2002); Tex. Bus. & Com. Code Ann. § 26.01(b)(3) (Vernon 2002); see generally Ann Laquer Estin, *Ordinary Cohabitation*, 76 Notre Dame L. Rev. 1381, 1395-96 (2001). For a collection of perspectives on *Marvin*'s legacy and the current lay of the land for unmarried cohabitators, see Symposium, *Unmarried Partners and the Legacy of Marvin v. Marvin*, 76 Notre Dame L. Rev. 1261 (2001).

82. See Merin, *supra* note 17, at 192.

83. 176 Cal. Rptr. 130 (Ct. App. 1981).

84. *Id.* at 131.

85. *Id.* at 133.

86. See Eskridge & Hunter, *supra* note 32, at 784. But see Whorton v. Dillingham, 248 Cal. Rptr. 405, 409 (Ct. App. 1988) (upholding an express agreement between two men where, notwithstanding their sexual relationship, one man acted as chauffeur, bodyguard, secretary and business partner to the other). *Jones*'s misapplication of

and its progeny have not resulted in the per se recognition of same-sex couples on an implied contract theory, the cases have provided couples guidance on how to best protect themselves.<sup>87</sup>

A sampling of other areas pertinent to same-sex couples that have been and continue to be litigated include whether a same-sex partner has standing to sue for negligent infliction of emotional distress when he or she witnesses an injury to her partner,<sup>88</sup> whether a co-habiting same-sex partner qualifies as a family member under a rent-control law in order to evade eviction,<sup>89</sup> and whether the denial of employment benefits to same-sex partners of state employees is sex discrimination and violates a state's privileges and immunities clause.<sup>90</sup>

## 2. Domestic Partnership

In response to judicial challenges and the reality that families come in many forms, state and other local governments have begun to provide limited recognition to same-sex couples.<sup>91</sup> The most common governmental solution is a domestic partnership scheme.<sup>92</sup> Domestic

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*Marvin* has been criticized on the grounds that the court wrongfully emphasized the sexual aspect of the relationship without giving due credit to those other facets of the relationship that served as good consideration, such as those found in *Whorton*. See, e.g., Sharmila Roy Grossman, Comment, *The Illusory Rights of Marvin v. Marvin for the Same-Sex Couple Versus the Preferable Canadian Alternative*—M. v. H., 38 Cal. W. L. Rev. 547, 554-55 (2002).

87. A same-sex couple's best approach in seeking legal recognition of the agreements established within their relationship is to enter into an express, written agreement outlining the basis for the relationship, ownership rights in individual and common property, and dispute resolution procedures, among others. See, e.g., Crook v. Gilden, 414 S.E.2d 645 (Ga. 1992) (upholding a written agreement governing a couple's mutual contribution toward improvement of their real estate and sharing of expenses and assets); see also Curry et al., *supra* note 44, at 6/2-6/18, 6/3 (a "how to" guide emphasizing the lesson learned from *Jones* and other cases that one person's consideration in the relationship should not be meretricious); Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 Cardozo L. Rev. 1299, 1341 (1997) (noting that "[f]or the prescient same-sex partners who think to plan for and expressly decide their financial arrangements regarding property and support, courts by and large are willing to give legal effect to their agreements"). For couples who fail to memorialize their understanding, or in cases where such understanding changes over the life of the relationship, the courts are loath to enforce such an implied contract. *Id.* at 1342-45.

88. See *Coon v. Joseph*, 237 Cal. Rptr. 873, 875-78 (Ct. App. 1987) (declining to include an intimate homosexual partner in the class of close relatives eligible to sustain a claim for negligent infliction of emotional distress).

89. See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989) (defining a "family member" eligible to succeed to a rent regulated apartment to include an adult lifetime partner whose relationship with the deceased demonstrated emotional and financial interdependence).

90. See *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998) (holding that a governmental entity's denial of insurance benefits to the same-sex partners of its employees violates the privileges and immunities clause of the Oregon Constitution).

91. See *Bowman & Cornish*, *supra* note 11, at 1168-75.

92. *Id.* at 1186.

partnership legislation runs the gamut from municipal domestic partnership ordinances conferring a limited set of benefits and responsibilities, such as certain health care benefits, to the broadest statewide legislation, such as Vermont's civil union statute, which accords to same-sex couples the full panoply of rights and responsibilities given to married opposite-sex couples.<sup>93</sup> Domestic partnership has been described as one step further toward the recognition of legal rights than co-habitation and one step less than marriage.<sup>94</sup> Accordingly, while inroads have been made in certain jurisdictions to earn same-sex couples particular rights, the rights conferred on heterosexual couples through marriage still vastly outnumber those given to same-sex couples.<sup>95</sup>

The core arguments for domestic partnership usually encapsulate the following premise: the definition of "family" should transcend the traditional husband, wife, and 1.86 children paradigm,<sup>96</sup> and the state's sole recognition of these units should be broadened to include other families.<sup>97</sup> Such other families should include those that meet the

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93. See Vt. Stat. Ann. tit. 15, §§ 1201-1207 (2002). The statute provides: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." *Id.* § 1204(a). In contrast, many municipal ordinances offer few benefits. See *infra* note 108 and accompanying text. The legislative and judicial approaches can intersect: Vermont's civil union law is one product of joint-legislative and judicial action. See Johnson, *supra* note 32, at 36-37 ("Rather than creating a combative atmosphere between the two branches, the Vermont Supreme Court's collaborative approach empowered the legislature to fashion its own just and constitutional remedy."). Lawyers seeking social reform in varying contexts debate which method is the most productive. See, e.g., Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens when Courts Run Government* (2003). Professors Sandler and Schoenbrod argue that historically it was politics and politicians spurring legislative change, rather than progress in the courts, that was most effective: "Yet, on balance, the courts rode the wave of history rather than set it in motion. Seen from this broader perspective, the heroism in the courthouse is no less heroic, but of a different nature." *Id.* at 33.

94. Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 San Diego L. Rev. 163, 165 (1995). One alternative view analogizes same-sex and opposite-sex cohabitation to a business partnership. See Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 Harv. C.R.-C.L. L. Rev. 79, 101-12 (2001).

95. See *supra* Part I.A.

96. See Census Bureau, Statistical Abstract of the United States: 2000, at 57 (1999), available at <http://www.census.gov/prod/2001pubs/statab/sec01.pdf>.

97. See Ettelbrick, *supra* note 48, at 132-52. Professor Ettelbrick argues that the policy goal undergirding the provision of certain benefits to families should be followed:

As long as legally recognized family status is the gateway to benefits and privileges, the question must be asked whether the policy goal for providing the benefit is furthered or diminished by allowing access only to married or biological family members. Access to benefits and privileges should be guided by a desire to fulfill the purpose for which those benefits are provided, not by rigid definitions of family.

traditional indicia of the institution—including, but not limited to, monogamy, financial interdependence, and age requirements—but have a different face.<sup>98</sup> One commentator sums up the question that seems logical to many, and is often posed to support domestic partnership laws: “If the strongest of public policy goals is to support families . . . is there any justification for allowing only those families joined by marriage, or only those families biologically joined, to partake in economic and social support?”<sup>99</sup> In limited instances, states have embraced this policy goal by using their powers to extend some protections and benefits to same-sex couples.

### a. *Municipal Domestic Partnership Ordinances*

Domestic partnership, along with marriage, falls within the domain of state regulation.<sup>100</sup> Because states are principally responsible for the general welfare of their citizenry, their powers extend to legislating in marriage, domestic partnerships, if applicable, and the corresponding benefits reserved to each.<sup>101</sup> At a micro level, municipalities within states can also legislate with respect to marriage and domestic partnerships,<sup>102</sup> although this right has been challenged.<sup>103</sup> Notwithstanding the challenges, it is at the municipal

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*Id.* at 139.

98. *Id.* at 132-52.

99. *Id.* at 139.

100. See 52 Am. Jur. 2d *Marriage* § 10 (2000).

101. See Leonard, *supra* note 19, at 133-34; see, e.g., Haw. Rev. Stat. § 572C (Michie Supp. 2001) (reciprocal beneficiaries); Ohio Rev. Code Ann. § 3101 (Anderson 2003) (marriage); Or. Rev. Stat. § 106 (2003) (marriage); Vt. Stat. Ann. tit. 15, §§ 1201-1207 (2002) (civil unions); Wis. Stat. Ann. § 765 (West 2001 & Supp. 2003) (marriage).

102. Leonard, *supra* note 19, at 148-49; see, e.g., Ann Arbor, Mich. Code tit. IX, ch. 110 (1991) (creating a domestic partners registry), available at <http://livepublish.municode.com/12/lpext.dll?f=templates&fn=main-hit-j.htm&2.0>; Boston, Mass., Public Health & Welfare Ordinance ch. 12-9A (1993) (creating a domestic partnership registry with certain benefits), available at [http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=alp:boston\\_ma](http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=alp:boston_ma); New York, N.Y., Admin. Code §§ 3-240 to 3-245 (Supp. 2003) (creating a domestic partnership registry and process for registration); S.F., Cal., Admin. Code ch. 62 (1991) (allowing for the registration of domestic partnerships and granting health benefits to partners of city employees), available at [http://www.amlegal.com/sfadmin\\_nxt/gateway.dll?f=templates&fn=default.htm&vid=alp:sf\\_admin](http://www.amlegal.com/sfadmin_nxt/gateway.dll?f=templates&fn=default.htm&vid=alp:sf_admin).

103. Most challenges are based on the common argument that the municipality has overreached its lawmaking authority by legislating in the area of marriage—an area usually reserved to the state. See Robin Cheryl Miller, Annotation, *Validity of Governmental Domestic Partnership Enactment*, 74 A.L.R.5th 439, 444-45 (1999); see generally Bowman & Cornish, *supra* note 11, at 1198-203 (noting that while courts have clarified that it is the states' duty to define civil status, politics make it difficult for most states to recognize non-marital unions). Resolution of the dispute normally turns on whether the municipality conflicts with, and is preempted by, state law. See Miller, *supra*, at 445. In *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. App. Ct. 1999), the domestic partnership ordinance in question made employee benefits available to unmarried, same-sex partners of its city employees. *Id.* at 99-100. The



level that most progress for the recognition of domestic partnerships has been made.<sup>104</sup>

Municipalities have led the charge in the fight for benefits for same-sex couples<sup>105</sup> by enacting measures designed to extend the benefits of marriage either solely to same-sex couples or to same-sex couples and

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plaintiff-taxpayers argued that in creating this ordinance the city "acted beyond the scope of its home rule authority, which does not allow it to create a new marital status, domestic partnership, or grant the same employee benefits, legal rights and privileges that the City gives to the married spouses of its employees." *Id.* at 96. The Illinois appellate court held that the state constitution allowed municipalities to govern and legislate concurrently with the state in areas of common interest unless explicitly preempted. *Id.* at 96-97. While defining and regulating the institution of marriage was of statewide rather than local concern, the municipality was not legislating with respect to marital status at all. Instead, its legislation was merely extending health benefits to a certain class of people residing with city employees, *id.* at 98, an action within the realm of its role in legislating with regard to public health, *id.* at 97. A similar ordinance in Atlanta has withstood attack on similar grounds. In *City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997), the Georgia Supreme Court held constitutional an Atlanta ordinance that extended certain insurance benefits to "dependents" of city employees who were registered as domestic partners under Atlanta's domestic partnership ordinance. *Id.* at 194. The court reasoned that the benefits ordinance legislated in an allowable area within its home rule authority: the health of its employees and their dependents. *Id.* at 195-96. Further, the definition of "dependent" in the ordinance was constitutional because it referred to a person who relies on another for financial support. *Id.* at 195. This definition differed from the one used in a preceding version of the ordinance that had been previously held unconstitutional. *City of Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995). In *McKinney*, the court held unconstitutional a preceding version of the insurance benefits ordinance that did not define the term "dependent." *Id.* at 521. The court interpreted the ordinance to impermissibly recognize domestic partners as family members—comparable to spouses—and extend to them insurance benefits. *Id.* Consequently, the ordinance was held constitutional when viewed as a means by which to provide benefits to someone who was simply relying on someone else for financial support, *see Morgan*, 492 S.E.2d at 195, as opposed to being viewed as someone who was a "spouse" of an individual of the same sex. *See McKinney*, 454 S.E.2d at 521.

104. Leonard, *supra* note 19, at 147. Professor Leonard notes that one argument municipalities face in opposition to granting domestic partner benefits solely to same-sex couples is that their ordinances exclude unmarried heterosexual couples who neither benefit from marriage nor same-sex couple benefits. *Id.* at 147-48. While some argue that the two groups cannot be compared because heterosexuals have the ability to marry, certain municipalities, in response, have extended their domestic partner ordinances to both sets of couples. *Id.* at 148; *see also* Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 Fordham L. Rev. 1699, 1739 (1998) ("The failure of political will to provide a viable alternative to marriage for same-sex couples is nowhere more apparent than in the state capitols of the nation."); Jonathan Andrew Hein, *Caring for the Evolving American Family: Cohabiting Partners and Employer Sponsored Health Care*, 30 N.M. L. Rev. 19, 31 (2000) ("Local governments are counted among the leaders in introducing and experimenting with domestic partner benefits.").

105. Progress at the municipal level represents, in part, a response to the increase in nontraditional families and changing social mores. *See Bowman & Cornish, supra* note 11, at 1188-91. Such progress is arguably easier to achieve at the municipal level because of the greater likelihood that a group of residents sharing a common political ideology will have greater political power to implement it.

unmarried heterosexual couples.<sup>106</sup> These measures vary widely in terms of the scope of the benefits provided and their reach. Many municipalities allow a same-sex couple to "register" their relationship if it meets certain criteria, such as age, monogamy, and cohabitation.<sup>107</sup> On one end of the spectrum, registries provide no benefit other than a symbolic one: the ability to claim the municipality recognizes the partnership.<sup>108</sup> On the other end, which is usually limited to employees of the municipality, the benefits are more substantial: the partner of the employee is treated as if she is a spouse and thus gains all of the benefits that are normally given through employment.<sup>109</sup> An additional benefit associated with the more comprehensive registries is the right to prison and hospital visitation.<sup>110</sup>

One of the more comprehensive registries is California's statewide registry.<sup>111</sup> Passed into law in 2001, the registry allows for the

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106. See Miller, *supra* note 103, at 444. Many domestic partnership measures apply solely to same-sex couples, ostensibly because heterosexual couples are viewed as having the ability to marry. *Id.* One example of the more inclusive approach is Austin, Texas, where the ordinance—which extended benefits to both classes of couples—was eventually overturned by a court under the argument that the inclusion of unmarried heterosexual couples undercut Texas's interest in promoting heterosexual marriage. *Bailey v. City of Austin*, 972 S.W.2d 180, 189 (Tex. App. 1998).

107. See Bowman & Cornish, *supra* note 11, at 1192-93. In addition to detailing existing domestic partnership requirements, Bowman and Cornish propose requirements in a model domestic partnership law for future use. Similar indicia, such as economic interdependency, monogamy and age, were used in New York's post-September 11, 2001 laws to determine which relationships were eligible for certain monetary awards. See *infra* Part I.C.2. To no surprise, the elements implicit in marriage, such as economic interdependency, monogamy and age, are often used.

108. See Bowman & Cornish, *supra* note 11, at 1195.

109. The dearth of benefits available in the domestic partnership laws on the former end of the spectrum has been criticized. See Christensen, *supra* note 104, at 1734 ("The much-heralded advent of local domestic partnership laws, for example, is mostly about modest symbolic gestures accompanied by few if any tangible benefits.") As of March 2004, there were 140 city, county and state governments that extend some form of benefits to the same-sex partners of their employees. See The Human Rights Campaign Foundation, Work Life, at [http://www.hrc.org/Template.cfm?Section=The\\_Issues&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=26&ContentID=13399](http://www.hrc.org/Template.cfm?Section=The_Issues&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=26&ContentID=13399) (last visited Mar. 28, 2004).

110. See Heidi Eischen, Survey, *For Better or Worse: An Analysis of Recent Challenges to Domestic Partner Benefits Legislation*, 31 U. Tol. L. Rev. 527, 530 (2000).

111. Cal. Fam. Code §§ 297-299 (West Supp. 2004). The registry allows for a domestic partnership between two individuals of the same sex or between a man and a woman where one individual is older than sixty-two-years-old. *Id.* § 297(b)(6). The couple must share a common residence, jointly share responsibility for expenses, and the individuals must be at least eighteen-years-old and not be married or blood related. *Id.* § 297(b)(1)-(5). For a description of the registry's requirements and the benefits it offers, see Megan E. Callan, Comment, *The More, the Not Marry-er: In Search of a Policy Behind Eligibility for California Domestic Partnerships*, 40 San Diego L. Rev. 427, 429-36 (2003). California is also home to the nation's first municipality offering a domestic partner registry: Berkeley. After Berkeley, other

adoption by one domestic partner of the other's child,<sup>112</sup> recovery rights in negligent infliction of emotional distress actions,<sup>113</sup> standing for wrongful death claims,<sup>114</sup> and eligibility for employment benefits where an individual's domestic partner is a state employee.<sup>115</sup> Of course, this last benefit is limited in that it leaves those people whose partners are not state employees to seek benefits through a private employer, or face finding them on their own.<sup>116</sup>

One way to cast the domestic partner benefits net wider is espoused by the City and County of San Francisco's Equal Benefits Ordinance (the "Ordinance"), which obligates all private companies contracting with the city or county to offer the same benefits to the same-sex partners of its employees that it offers to the spouses of its employees, or be ineligible to contract.<sup>117</sup> The Ordinance, however, has been successfully challenged in the Ninth Circuit on the grounds that it directly conflicts with the Employee Retirement Income Security Act of 1974 ("ERISA"),<sup>118</sup> which preempts state and local laws relating to employee benefit plans.<sup>119</sup> In another Ninth Circuit case, the issue of

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major American cities followed: West Hollywood, CA; Madison, WI; Los Angeles, CA; Seattle, WA; New York, NY; and San Francisco, CA. See Bowman & Cornish, *supra* note 11, at 1188-90.

112. Cal. Fam. Code § 9000 (West Supp. 2004). The statute provides that: "A domestic partner, as defined in Section 297, desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides." *Id.* § 9000(b).

113. Cal. Civ. Code § 1714.01 (West Supp. 2004) ("Domestic partners shall be entitled to recover damages for negligent infliction of emotional distress to the same extent that spouses are entitled to do so under California law.").

114. Cal. Civ. Proc. Code § 377.60 (West Supp. 2004).

115. Cal. Gov't Code § 22873(a) (West Supp. 2004) ("Any employer or contracting agency may, at its option, offer health benefits pursuant to this article, to the domestic partners of its employees and annuitants.").

116. See *infra* notes 144-48 and accompanying text for a discussion of how same-sex couples attain such benefits through the private sector.

117. S.F., Cal., Admin. Code ch. 12b, c (1996), available at [http://www.sfgov.org/site/sfhumanrights\\_index.asp?id=4584](http://www.sfgov.org/site/sfhumanrights_index.asp?id=4584).

118. 29 U.S.C. §§ 1001-1461 (2000). ERISA is a broad federal law governing employers' provision of fringe benefits, such as vacations, severance pay, health benefits and disability payments, to their employees. See Mark A. Rothstein et al., 1 Employment Law § 3.19, at 459-62 (2d ed. 1999). It is intended to protect employees: "[I]t protects the interests of participants in employee benefit plans and their beneficiaries in enforcing any benefit promise the employer does make by establishing certain minimum standards for all covered plans." *Id.* at 459.

119. See *Air Transp. Ass'n of Am. v. City & County of San Francisco*, 992 F. Supp. 1149, 1191 (N.D. Cal. 1998), *aff'd on other grounds*, 266 F.3d 1064 (9th Cir. 2001); see also Jeffrey A. Brauch, *Municipal Activism v. Federal Law: Why ERISA Preempts San Francisco-Style Domestic Partner Ordinances*, 28 Seton Hall L. Rev. 925, 961-62 (1998) (arguing that, while ERISA's scope had recently been limited by the U.S. Supreme Court, it had not been nullified and, consequently, San Francisco's ordinance should be unenforceable: "It is . . . the very type of law that Congress meant to preempt."). Others have argued that ERISA should not preempt state laws requiring private employers to award benefits to the domestic partners of their

ERISA preemption was avoided where the court held that the plaintiff lacked standing to bring the claim.<sup>120</sup> While its survival under ERISA preemption is shaky, San Francisco's ordinance has acted as a blueprint for similar ordinances in other jurisdictions, including Berkeley, California; Los Angeles, California; and Seattle, Washington.<sup>121</sup> Challenges to the Ordinance constitute only one example of the broader set of challenges waged against similar ordinances.<sup>122</sup>

### b. Civil Union Law and Reciprocal Beneficiaries Law

There are a total of ten states<sup>123</sup> and the District of Columbia<sup>124</sup> that grant certain health benefits to the same-sex partners of their employees. While California and New York employ domestic partnership schemes for state employees, Hawaii and Vermont go further through a "reciprocal beneficiaries" scheme and a civil union institution, respectively.

In *Baehr v. Lewin*,<sup>125</sup> the Hawaii Supreme Court held that the restriction of marriage to opposite-sex couples constituted sex discrimination that was a presumably unconstitutional violation of the Equal Protection Clause of the Hawaii Constitution.<sup>126</sup> The court

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employees. See Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 Tul. L. Rev. 373, 403-27 (2001).

120. S.D. Myers, Inc. v. City & County of S.F., 253 F.3d 461, 474-76 (9th Cir. 2001) (affirming the district court's determination that plaintiff lacked standing for its claim that ERISA preempted the San Francisco ordinance). The court held the ordinance neither violated the Commerce Clause, *id.* at 470-71, nor did San Francisco overreach in its municipal governance by creating an ordinance that conflicted with the California State Constitution, *id.* at 474.

121. See Merin, *supra* note 17, at 202.

122. See generally Miller, *supra* note 103, at 439-52 (documenting cases challenging domestic partnership ordinances on the grounds that such ordinances overextend municipalities' home-rule authority).

123. See The Human Rights Campaign Foundation, Work Life, at [http://www.hrc.org/Template.cfm?Section=Search\\_the\\_Database&Template=/CustomSource/WorkNet/WorkplacePolicySearch.cfm&DPHealth=state&submitted=1&refresh=1](http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/WorkplacePolicySearch.cfm&DPHealth=state&submitted=1&refresh=1) (last visited Mar. 28, 2004). As of March 2004, ten states grant health benefits to the same-sex partners of their employees. *Id.* On January 8, 2004, the New Jersey Senate passed a bill recognizing domestic partnerships at the state level. Laura Mansnerus, *New Jersey to Recognize Gay Couples*, N.Y. Times, Jan. 9, 2004, at B1. The bill is expected to be signed into law by New Jersey Governor James E. McGreevey. *Id.* The legislation allows a domestic partner to make medical decisions for his or her partner, extends health coverage and pension benefits to the partners of state employees, and requires insurance companies to provide health care coverage to domestic partners equivalent to that of spouses. *Id.*

124. See The Human Rights Campaign Foundation, District of Columbia Laws Affecting GLBT People, at [http://www.hrc.org/Template.cfm?Section=Search\\_the\\_Law\\_Database&Template=/CustomSource/Law/StateDisplay.cfm&StateCode=DC&LawFlag=1&StatusInd=lawcurrent](http://www.hrc.org/Template.cfm?Section=Search_the_Law_Database&Template=/CustomSource/Law/StateDisplay.cfm&StateCode=DC&LawFlag=1&StatusInd=lawcurrent) (last visited Apr. 3, 2004).

125. 852 P.2d 44 (Haw. 1993).

126. *Id.* at 67.

remanded the case, directing the trial court to determine whether the discrimination was justified by a narrowly tailored compelling state interest.<sup>127</sup> On remand, the trial court held that the defendant had failed to meet its burden of proving a narrowly tailored compelling state interest.<sup>128</sup> In response to these decisions, the Hawaii state legislature passed its Reciprocal Beneficiaries Act in July 1997.<sup>129</sup> The Act allows both same-sex and opposite-sex Hawaiian couples who cannot or do not want to marry to register their relationships with the state, in exchange for many, but not all, of the benefits afforded to married Hawaiian couples.<sup>130</sup> The benefits include the right to hold property jointly as a tenancy by the entirety,<sup>131</sup> standing for wrongful death claims,<sup>132</sup> and hospital visitation rights.<sup>133</sup> While the Act does not grant all of the benefits given to married couples,<sup>134</sup> the list is more extensive than that of similar domestic partnership ordinances.<sup>135</sup> This tremendous victory was tempered, though, by the Hawaii state legislature's subsequent amendment to the Hawaii Constitution allowing the state legislature to define marriage as a relationship solely between a man and woman.<sup>136</sup>

Similarly, the Vermont state legislature passed its groundbreaking Civil Union Law<sup>137</sup> in response to the decision handed down by the

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127. *Id.*

128. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*21 (Haw. Cir. Ct. Dec. 3, 1996).

129. Haw. Rev. Stat. Ann. § 572C (Michie Supp. 2001). The Hawaii State Constitution's Equal Protection Clause is similar to that of the United States Constitution. It states, "No person shall be . . . denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights." Haw. Const. art. I, § 5.

130. Haw. Rev. Stat. Ann. § 572C-3 to -5.

131. *Id.* § 509-2.

132. *Id.* § 663-3.

133. *Id.* § 323-2.

134. *Id.* § 572C-6.

135. The most generous domestic partnership ordinances only grant health insurance to their employees' same-sex partners. *See supra* notes 107-10 and accompanying text.

136. Haw. Const. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."). *See generally* David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. Haw. L. Rev. 19 (2000) (recounting in detail the history leading to the amendment's passage and exploring the amendment's potential meaning). A similar sequence of events occurred further north in Alaska. In 1998, the Alaska Superior Court held that the denial of a marriage license to two men was a presumable violation of the state constitution on privacy and equal protection grounds that was subject to strict scrutiny. *Brause v. Bureau of Vital Stat.*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998). Soon thereafter, the Alaska state legislature amended the state constitution to define marriage to be solely between a man and a woman, thereby rendering the issue in the *Brause* decision moot. Alaska Const. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.").

137. Vt. Stat. Ann. tit. 15, §§ 1201-07 (2002).

Vermont Supreme Court in *Baker v. State*.<sup>138</sup> In *Baker*, the Court held that a denial to same-sex couples of the benefits incidental to marriage was a violation of the Common Benefits Clause of the Vermont State Constitution.<sup>139</sup> The Court ordered the state legislature to devise a remedy, or else the litigants could return to the courts for the relief they originally sought.<sup>140</sup> As a result, the legislature passed the Civil Union Law, thereby creating an institution parallel to marriage for same-sex partners.<sup>141</sup> Because it bestows to such couples every right, benefit, and obligation given to married couples in Vermont (except the name "marriage"), it is by far the most comprehensive legislative measure adopted in the United States with regard to same-sex benefits.<sup>142</sup> However, comparable legislation has not been instituted at the federal level.<sup>143</sup>

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138. 744 A.2d 864 (Vt. 1999).

139. See *id.* at 886. The Common Benefits Clause is the counterpart to the United States Constitution's Equal Protection Clause. U.S. Const. amend. XIV, § 1.

140. *Baker*, 744 A.2d at 886-87.

141. Vt. Stat. Ann. tit. 15, § 1201-07.

142. *Id.*; see Johnson, *supra* note 31, at 58 ("[C]ivil unions are so much like marriage that there is not all that much room to create something totally new and different." (citation omitted)).

143. In 2001, U.S. Representative Barney Frank of Massachusetts introduced a bill that would provide to same-sex and unmarried opposite-sex partners of federal employees benefits currently limited to the spouses of federal employees. Domestic Partnership Benefits and Obligations Act of 2001, H.R. 638, 107th Cong. (2001). For a description of the bill, see The Human Rights Campaign Foundation, Domestic Partners Benefits and Obligations Act (H.R. 2426/S. 1252), at [http://www.hrc.org/Template.cfm?Section=Domestic\\_Partnership\\_Benefits\\_and\\_Obligations\\_Act1](http://www.hrc.org/Template.cfm?Section=Domestic_Partnership_Benefits_and_Obligations_Act1) (last visited Mar. 29, 2004). To qualify under the law, couples would be required to satisfy a set of requirements similar to statutes in effect at the state and local levels. These requirements include: that individuals be eighteen years or older; they not be blood related in a way that, if they were of different sexes, they would be prohibited from marrying; they share a common residence; and they also share (to a certain degree) common financial obligations and a common welfare. *Id.* There had been no change in the status of the Bill until its reintroduction in the U.S. Senate and House of Representatives in June 2003 by co-sponsors, Representative Barney Frank and Senator Mark Dayton. The Human Rights Campaign issued a press release calling for support of the proposed Domestic Partnership Benefits and Obligations Act. See Press Release, The Human Rights Campaign Foundation, HRC Commends Reintroduction of Domestic Partner Bill for Federal Employees: Domestic Partnership Benefits and Obligations Act Would Bring Federal Government Benefits in Line with Corporate America (June 11, 2003), at [http://www.hrc.org/Template.cfm?Section=Domestic\\_Partnership\\_Benefits\\_and\\_Obligations\\_Act1&CONTENTID=10081&TEMPLATE=/ContentManagement/ContentDisplay.cfm](http://www.hrc.org/Template.cfm?Section=Domestic_Partnership_Benefits_and_Obligations_Act1&CONTENTID=10081&TEMPLATE=/ContentManagement/ContentDisplay.cfm). The proposed law received support from several presidential candidates as well as certain organizations, including the American Federation of Government Employees and Harvard University. *Id.* Regardless of a municipality or state's ability or willingness to view and treat same-sex couples as equivalent to married, heterosexual couples, neither can give access to the 1,049 protections given to married couples under federal law. Congress asked the U.S. General Accounting Office to provide it with a list of all "federal laws in which benefits, rights, and privileges are contingent on marital status." U.S. General Accounting Office, Letter Report on the Defense of Marriage Act, at <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=og97016.txt&directory=/diskb/wais>

/data/gao (last visited Mar. 29, 2004). The Office responded with a list of "1,049 federal laws classified to the United States Code in which marital status is a factor." *Id.* The so-called Defense of Marriage Act ("DOMA"), passed in 1996, ensured this by defining marriage, for federal purposes, as a relationship available solely to a man and a woman. 1 U.S.C. § 7 (2000). Consequently, a Vermont or Hawaii same-sex couple does not qualify for benefits under DOMA. Indeed, DOMA was passed in reaction to the Hawaii Supreme Court's decision: "[DOMA] was quietly signed by President Clinton, [in] response to a decision of the Hawaii Supreme Court that made it likely that same-sex marriage will soon be legal in that state." Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev. 1, 1 (1997). DOMA's second feature further, and perhaps even more alarmingly, injures same-sex couples by giving states an explicit right to not recognize a relationship from a sister state, thereby giving states the option not to honor a civil union entered into in Vermont or a reciprocal beneficiary relationship entered into in Hawaii. 28 U.S.C. § 1738C (2000) ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . ."). The second feature does this first by nullifying any potential right a state would have under the Full Faith and Credit Clause to recognize such a foreign relationship. U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."). While the Supreme Court has never applied the Full Faith and Credit Clause to a question of marriage, the possibility is now extinguished because DOMA's text precludes such a possibility. See Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 Colum. L. Rev. 1435, 1449-52, 1450 (1997) ("With DOMA, Congress forecloses what had been an open question about how the Full Faith and Credit Clause applies to marriages."). Second, it influences the application of the common law conflicts of law rule so that states may deny recognition of such relationships. See 28 U.S.C. § 1738C. The common law conflict of laws rule is that states are not obligated to recognize marriages from other jurisdictions where it would violate a strong public policy of the forum in which the question arises. See Koppelman, *supra*, at 10. Traditionally, under the common law conflicts of law rule a state will recognize a marriage from another jurisdiction unless it violates its own public policy. Ruskay-Kidd, *supra*, at 1447-49. While an initial read of DOMA's text may appear to merely reinforce this rule, it tramples on an important caveat of the rule, namely, the limitation that the ability to ignore a foreign relationship is limited solely to the state with the most significant relationship to the couple. *Id.* This power is now extended to all states, regardless of its connection to the couple. At least thirty-four states have since enacted "junior-DOMAs," i.e., statutes allowing the state to not recognize a same-sex marriage entered into in another state. William N. Eskridge, Jr., Lecture, *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 Alb. L. Rev. 853, 862 (2001); see also Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 Cardozo L. Rev. 299, 305-10 (2001). Unless defeated on constitutional grounds, a junior-DOMA would most likely prevent recognition of a civil union entered into in Vermont. Eskridge, *supra*, at 862. Also of note at the federal level is the fact that the Internal Revenue Service does not recognize the benefits given to same-sex partners by employers. Merin, *supra* note 17, at 199. Normally, benefits given to the spouse of an employee are not included in the employee's gross income. However, the opposite is true with domestic partners: any benefits received are taxable unless the other partner qualifies as a dependent. *Id.* at 199 n.124. Qualifying as a dependent, however, would be impossible if the relationship between the two is violative of local law. This was the case for same-sex couples living in a jurisdiction with sodomy laws on its books prior to the Supreme Court's invalidation of such laws in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

### c. Employer-Granted Benefits

While clearly important and valuable to all same-sex couples, most domestic partnership laws passed by municipalities offer the greatest benefits only to municipal employees and their partners and, thus, work only as a symbolic victory for other couples not employed by the municipality.<sup>144</sup> Another means by which same-sex couples can obtain marriage-type benefits occurs in the private sector through their employers.<sup>145</sup> Many private employers now grant to domestic partners those benefits previously available only to their employees' spouses. As of April 2004, 7,009 United States private sector companies and colleges and universities extended benefits to the same-sex partners of their employees.<sup>146</sup> In 1982, New York City's *Village Voice* newspaper was the first such private employer.<sup>147</sup> Thousands of companies have followed, and today 210 of all Fortune 500 companies do the same.<sup>148</sup>

### 3. Limited Recognition of Same-Sex Couples in New York

The New York Court of Appeals' landmark decision in *Braschi v. Stahl Associates Co.*<sup>149</sup> and the evolution of New York City's Domestic Partnership Law<sup>150</sup> serve as two examples of how New York has provided certain rights and benefits to its same-sex couples that other jurisdictions have not. Nonetheless, the benefits are limited and the time taken to win them evidences the degree of resistance against the legal recognition of these couples.

#### a. *Braschi v. Stahl Associates Co.*

One judicial victory recognizing certain rights of same-sex couples in New York State also stands as a significant national victory. In 1989, the New York Court of Appeals delivered a landmark victory to same-sex couples living in New York City in its decision in *Braschi v.*

144. See *supra* note 108 and accompanying text.

145. See generally Knauer, *supra* note 26, *passim* (arguing that while they are beneficial to same-sex partners and a step in the right direction generally, market-derived benefits offered by employers are not the equivalent of the greater set of benefits that should be automatically provided by law).

146. See The Human Rights Campaign Foundation, Domestic Partner Benefits, at [http://www.hrc.org/Template.cfm?Section=The\\_Issues&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=26&ContentID=13399](http://www.hrc.org/Template.cfm?Section=The_Issues&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=26&ContentID=13399) (last visited Mar. 29, 2004).

147. See The Human Rights Campaign Foundation, What Are Domestic Partner Benefits?, at [http://www.hrc.org/Content/NavigationMenu/Work\\_Life/Get\\_Informed2/The\\_Issues/What\\_Are\\_DPB/Definition.htm](http://www.hrc.org/Content/NavigationMenu/Work_Life/Get_Informed2/The_Issues/What_Are_DPB/Definition.htm) (last visited Mar. 29, 2004).

148. See The Human Rights Campaign Foundation, Domestic Partner Benefits, at [http://www.hrc.org/Template.cfm?Section=The\\_Issues&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=26&ContentID=13399](http://www.hrc.org/Template.cfm?Section=The_Issues&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=26&ContentID=13399) (last visited Mar. 29, 2004).

149. 543 N.E.2d 49 (N.Y. 1989).

150. New York, N.Y., Admin. Code §§ 3-240 to -245 (Supp. 2003).



*Stahl & Associates Co.*<sup>151</sup> In *Braschi*, a landlord sought to evict the same-sex partner of a tenant of a rent-controlled apartment who had died.<sup>152</sup> The City's rent-control regulation provided non-eviction protection to the "surviving spouse of the deceased tenant or some other member of the deceased tenant's family."<sup>153</sup> The term "family" was undefined and the court held that it should not be narrowly interpreted to exclude committed partners who merely lacked a formalization of their relationship, such as a marriage certificate.<sup>154</sup>

The court reasoned that the intent of the regulation was satisfied because it protected an individual from sudden eviction, while still not breaking down the line between committed couples and mere roommates.<sup>155</sup> The court then provided guidance to future courts determining whether an individual satisfied this new family member test by directing them to look to a multitude of factors, including: "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services."<sup>156</sup> This test clearly redefined family members to include a tenant's same-sex partner.

The first lasting effect of the court's opinion is its codification in New York tenancy laws.<sup>157</sup> A second effect of the Court's opinion is a new willingness to move from interpreting "family" as a traditional, heterosexual nuclear unit to interpreting it as one that "find[s] its foundation in the reality of family life."<sup>158</sup> The characteristics that the court looked to in determining whether a couple qualifies are very similar to those characteristics looked at in statutes defining what constitutes "domestic partners."<sup>159</sup>

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151. 543 N.E.2d at 49 (1989).

152. *Id.* at 50-51.

153. *Id.* at 50 (quotations omitted).

154. *Id.* at 53-54.

155. *Id.* at 54.

156. *Id.* at 55.

157. See N.Y. Comp. Codes R. & Regs. tit. 9, § 2520.6(o)(2) (2001).

158. *Braschi*, 543 N.E.2d at 53. *But see* *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991) (holding that a same-sex, former partner of a biological mother does not constitute a "parent" for the purpose of establishing visitation rights of the biological mother's child); *In re Cooper*, 592 N.Y.S.2d 797, 799 (App. Div. 1993) (declining to extend the reasoning in *Braschi* to a same-sex partner who sought a right of election against his decedent partner's will). The court in *Cooper* stated, "We reject, as meritless, the contention of both the petitioner and the *amicus curiae* that, based on the Court of Appeals decision in *Braschi v. Stahl Assocs. Co.* . . . the traditional definition of the term 'surviving spouse' must be rejected, and replaced with a broader definition which would include the petitioner." *Id.*

159. See *infra* Part I.C. for examples of the post-September 11, 2001 New York statutes that use criteria such as monogamy, age requirements, and economic interdependence.

b. *New York City Domestic Partnership Law*

New York City passed its Domestic Partnership Law in 1998,<sup>160</sup> codifying two prior Mayoral Executive Orders.<sup>161</sup> The first Mayoral Executive Order was issued in 1989 by Mayor Ed Koch, who directed city agencies to recognize domestic partners for purposes of bereavement leave.<sup>162</sup> In 1993, Mayor David Dinkins reaffirmed the previous Executive Order and established a central domestic partnership registry.<sup>163</sup>

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160. New York, N.Y., Admin. Code §§ 3-240 to -245 (Supp. 2003). The legislative intent section of the provision provided the following statistics on usage of the registry:

By the end of April 1998, there were approximately 8,700 couples registered as domestic partners in New York City. More than 55% of those registered domestic partners were heterosexual couples, and less than 45% were same sex couples. Almost forty percent of registered domestic partnerships have accessed City health benefits available to partners of City employees and retirees.

*Id.* § 3-240, note.

161. In 1993, Mayor David Dinkins reaffirmed the previous executive order and established a central domestic partnership registry. See Arthur S. Leonard, *Mayor Giuliani Proposes His Domestic Partnership Policy*, 4 City Law 49, 51 (1998). Notably, this new Executive Order liberalized the requirements by abandoning the one-year continuous cohabitation requirement and replacing it with a requirement that the couple only have cohabited for some (undefined) period of time. *Id.*

162. New York City Mayoral Exec. Order No. 123 (Aug. 7, 1989). The Executive Order was issued one month after *Braschi*, see *supra* Part I.B.3.a., was decided. See Leonard, *supra* note 161, at 51. Professor Leonard explains that, while Mayor Koch's move was interpreted by some to be a political one to lure gay voters from his Democratic Party opponent, then-Manhattan Borough President, David Dinkins, Mayor Koch had consistently been a pro-gay advocate as a Congressman, as well as earlier in his administration as Mayor. *Id.* In order to qualify as domestic partners, (1) either both individuals had to be city residents or one individual had to be a city employee; (2) both individuals had to be at least eighteen years of age; (3) neither individual could be legally married; (4) the couple was required to have a close and committed relationship showing mutual responsibility; (5) the couple must have lived together for at least one year on a continuous basis at the time of registration; and (6) the relationship must have been registered with the applicable city agency with which they were employed. *Id.*

163. See Leonard, *supra* note 161, at 51. Most significantly, Mayor Dinkins, in response to a settlement reached in *Gay Teachers Ass'n v. Board of Education*, 585 N.Y.S.2d 1016 (App. Div. 1992), that awarded health insurance benefits to the domestic partners of the City's teachers, and extended such benefits to the domestic partners of active and retired city employees. See Leonard, *supra* note 161, at 51. The package matched exactly the benefits previously given solely to city employees' spouses. *Id.* Settlement in *Gay Teachers* was reached after the New York Supreme Court, Appellate Division, denied defendant's summary judgment motion, referring to *Braschi* when it gave deference to "the current state of the law regarding discrimination in this area of family relationships" to come to its result. *Gay Teachers*, 585 N.Y.S.2d at 1016. One year later, Governor Mario Cuomo issued an Executive Order giving health insurance coverage to the same-sex partners of non-union managerial employees. See Leonard, *supra* note 161, at 52. He concurrently endorsed such coverage for union employees working for the state by authorizing state agencies to negotiate with their unions to provide the same benefits. See *id.*; see also AP Political Serv., *New Cuomo Plan Offers Insurance Benefits to "Significant Others,"*

The Domestic Partnership Law is more comprehensive than similar registries in other jurisdictions in the scope of benefits and the degree of obligations imposed on domestic partners.<sup>164</sup> In addition to health insurance coverage,<sup>165</sup> the other unique benefits include an obligation imposed on the City Clerk to ensure the confidentiality of the registry<sup>166</sup> and a right to receive a potential monetary award from the Mayor if a domestic partner is a member of the fire department or police force killed in the line of duty.<sup>167</sup> One of the more significant benefits—the inclusion of domestic partners in the definition of “family” members under the Building Code (codifying *Braschi*)—is a confirmation of the prior Orders.<sup>168</sup>

In August 2002, the New York City Council further extended the reach of the registry by automatically recognizing as domestic partners those same-sex couples who had already lawfully registered in other jurisdictions their domestic partnerships, civil unions, or marriages.<sup>169</sup> Prior to this amendment, such couples that moved to New York City faced a one-year waiting period to establish eligibility.<sup>170</sup> This automatic recognition measure was intended to allow such couples to instantly enjoy all the rights, benefits, and obligations available to domestic partners already registered under New York City law.<sup>171</sup>

New York City's registry, however, has not been immune to challenge.<sup>172</sup> In *Slattery v. City of New York*, a group of taxpayers challenged the registry on the grounds that it impermissibly legislated in the area of marriage.<sup>173</sup> The New York Supreme Court, Appellate Division, rejected this argument, holding that “defendant [New York] City did not . . . impermissibly legislate in the area of marriage since the provisions of the [Domestic Partnership Law] all relate to areas in which the City has long and properly legislated and do not conflict with State law or public policy.”<sup>174</sup> It further held that the City had

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Sept. 17, 1994, at 1, *available at* 1994 WL 3342928. This marked New York's first statewide action benefiting same-sex couples that was not judicially created.

164. See Leonard, *supra* note 161, at 52.

165. New York, N.Y., Admin. Code § 12-307(c) (Supp. 2003).

166. *Id.* § 3-243.

167. *Id.* § 12-126(b)(2)(i).

168. *Id.* § 27-232.

169. *Id.* §§ 3-240(a), -245.

170. City Council Member Christine Quinn explained the effect of the amendment. See *NYC Recognizes Gay Partnerships*, *cnn.com* (Aug. 16 2002), at <http://www.cnn.com/2002/US/08/16/nyc.gay.partners/>.

171. *Id.*

172. *Slattery v. City of New York*, 697 N.Y.S.2d 603 (App. Div. 1999).

173. *Id.* at 604. For other examples, see generally *supra* note 102.

174. *Slattery*, 697 N.Y.S.2d at 604. A Pennsylvania Commonwealth Court, among others, has come to the opposite conclusion. *Devlin v. City of Philadelphia*, 809 A.2d 980, 986 (Pa. Commw. Ct. 2002) (“[W]e hold that the City did indeed act beyond the scope of its power and contrary to [the state-enabling legislation] when it defined and created for legal purposes a new relationship between same-sex persons that it categorized as being part and parcel of the marital state.”).

the right to enter into healthcare plans and could, under *Braschi*, define “family” expansively.<sup>175</sup> The court then rejected plaintiffs’ additional argument that the City had “transformed the domestic partnership into a form of common law marriage” on the grounds that the two are very different.<sup>176</sup>

### C. Post-September 11, 2001 Legislation

Part I.B.3. discussed how two of New York’s greatest legal victories for same-sex couples, while beneficial, only chipped away at the broader number of disadvantages same-sex couples face. With this in mind, the importance of New York’s post-September 11, 2001 legislation is clear. Soon after September 11, 2001, federal and state government hurriedly instituted legislation across all government levels.<sup>177</sup> This section analyzes the legislation passed at the federal level and the legislation passed in New York State, the site of the World Trade Center attacks. At both levels, the legislation materially departed from precedent.<sup>178</sup>

#### 1. Federal Legislation

At the federal level, Congress passed the Air Transportation Safety and System Stabilization Act<sup>179</sup> only eleven days after the September 11, 2001 attacks. This Act consists of a federal provision of monetary assistance to the airline industry,<sup>180</sup> the institution of new airline security measures,<sup>181</sup> and the creation of the September 11th Victim Compensation Fund of 2001.<sup>182</sup> Shortly thereafter, on October 26,

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175. *Slattery*, 697 N.Y.S.2d at 604.

176. *Id.* at 605.

177. For an overview of the federal legislation, and its place in tort and insurance law, see Symposium, *The Law and Economics of Providing Compensation for Harm Caused by Terrorism*, 36 Ind. L. Rev. 229 *passim* (2003), and Stephen P. Watters & Joseph S. Lawder, *The Impact of September 11th on Tort Law and Insurance*, 29 Wm. Mitchell L. Rev. 809 (2003).

178. Private organizations also accounted for surviving same-sex partners. After being notified by ESPA and other organizations of inconsistent relief awards to same-sex partners of victims of September 11, 2001, the Red Cross formally issued a statement that it would award family relief to same-sex partners and their children. The Red Cross issued these instructions to its workers with a list of sixteen broad factors, such as joint property ownership, joint leases, joint bank accounts, joint credit cards, and utility bills including both individuals’ names, that could be used to determine whether an individual claiming to be a partner of a victim was eligible. See Press Release, Empire State Pride Agenda, Red Cross Issues Guidelines on Relief Assistance to Gay/Lesbian Survivors of September 11 (Dec. 4, 2001), at <http://www.prideagenda.org/pressreleases/pr-12-04-01.html>.

179. Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C §§ 40101 note, 44302-44306 (Supp. 2001)).

180. *Id.* §§ 101-107, 115 Stat. at 230-34.

181. *Id.* §§ 501-502, 115 Stat. at 241.

182. *Id.* §§ 401-409, 115 Stat. at 237-41; see *infra* Part II.C.1.a.; see also Marshall S. Shapo, *Compensation for Victims of Terror: A Specialized Jurisprudence of Injury*, 36

2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act") to punish terrorist acts and enhance law enforcement investigatory tools.<sup>183</sup> On November 19, 2001, Congress passed the Aviation and Transportation Security Act to establish under the Department of Transportation a "Transportation Security Administration" tasked with the responsibility of improving aviation security.<sup>184</sup> Lastly, Congress passed the Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002, which compensates certain family members of lost firefighters and police officers, including an individual designated as the beneficiary of a life insurance policy.<sup>185</sup> Of all the federal legislation passed, the Federal Victims' Compensation Fund most directly impacted the lives of same-sex survivors of victims.

a. *Federal Victims' Compensation Fund ("FVCF")*

The FVCF was passed into law on September 22, 2001.<sup>186</sup> The Act is intended to insulate the airline industry from the financial fallout of September 11, 2001.<sup>187</sup> Consequently, the FVCF authorizes monetary awards on a case-by-case basis to the survivors of victims of September 11, 2001<sup>188</sup> in exchange for a release from all claims a victim's estate may have against the airline industry.<sup>189</sup> The Department of Justice was given authority to administer the FVCF and, to that end, it named a "Special Master" to hear all individual

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Ind. L. Rev. 237, 243 (2003) (describing the Fund as a "symbol of displaced vengeance and a marker of social compassion").

183. Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified at scattered sections of U.S.C.).

184. Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified at scattered sections of U.S.C.).

185. Pub. L. No. 107-196, 116 Stat. 719 (2002) (to be codified at scattered sections of U.S.C.).

186. §§ 401-409, 115 Stat. at 237-41.

187. *Id.* § 101, 115 Stat. at 230 ("An Act [t]o preserve the continued viability of the United States air transportation system.").

188. *Id.* § 406, 115 Stat. at 240. Those eligible for awards under the FVCF are (1) the families of victims of the four flights and (2) persons injured or the families of victims killed at any of the three crash sites. *Id.* § 405(c), 115 Stat. at 239-40. The Washington Post reported that the first family to publicly accept its package under the FVCF was awarded \$1.04 million and, in the words of their attorney, accepted the payout in lieu of legal action because they "wanted closure." Christine Haughney, *WTC Victim's Family Takes Compensation; Federal Fund to Pay \$1.04 Million*, Wash. Post, Aug. 9, 2002, at A3.

189. § 405(c)(3)(B), 115 Stat. at 240. If families sue, the airlines' liability is capped at their respective insurance limits. *Id.* § 408(a), 115 Stat. at 239-40. If claimants opt to bring suit, venue is limited to the United States District Court, Southern District of New York. *Id.* § 408(b)(3), 115 Stat. at 241. Consequently, some families may feel they have no choice but to acquiesce in submitting a claim to the FVCF.

claims and establish by regulation the "procedural and substantive rules" of the fund.<sup>190</sup> Accordingly, on March 13, 2002, the Special Master issued interim rules, accepted comments on them, and then issued the final rules, dictating how the fund would be administered.<sup>191</sup>

For those victims with wills naming a same-sex partner as the executor of his or her estate, recovery should not be problematic as the Special Master is obligated to recognize that person as the "Personal Representative" representing the victim.<sup>192</sup> However, if the victim died intestate, the Special Master must defer to the decedent's domicile's intestacy laws.<sup>193</sup> The potential reliance on state intestacy laws in determining the Personal Representative<sup>194</sup> concerned commentators from the beginning because it raised the question of whether same-sex partners of victims would be left out.<sup>195</sup>

From the beginning, advocates anticipated an inequitable distribution, if any, to the same-sex partners of victims.<sup>196</sup> In response

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190. *Id.* § 404(a), 115 Stat. at 237-38.

191. 28 C.F.R. pt. 104 (2003). Under the FVCF, a victim is represented by a "Personal Representative," who files a claim on her behalf. § 104.4(a). The Personal Representative is determined in the following order: (1) an individual appointed by a court to be the Personal Representative of the decedent or as the executor or administrator of the decedent's will or estate; (2) where no Personal Representative or executor or administrator has been appointed, the Special Master may choose the person named in the decedent's will as the executor or administrator of the decedent's estate; or (3) in the event no will exists, the Special Master may look to the laws of the decedent's domicile governing intestacy. *Id.* Even if a same-sex partner has a legitimate claim to be a Personal Representative, he or she is required to notify all other potential Personal Representatives, including the victim's family members, of his or her claim. *Id.* § 104.4(b). This notice requirement is highly problematic if a victim's family opposed the relationship, see Knauer, *supra* note 23, at 64, or in the event the victim never divorced a prior spouse. For such an example, see Gross, *supra* note 15.

192. Further, the Personal Representative is distinct from the ultimate beneficiary(ies) of the proceeds. See Knauer, *supra* note 23, at 60-61.

193. § 104.4(a).

194. See *supra* Part I.A.1. for a discussion of the treatment of same-sex couples under state intestacy laws.

195. See Knauer, *supra* note 23, at 60-76. Unless the victim was a resident of Vermont, Hawaii or California, a same-sex partner will not be an eligible recipient under any state's law. See *supra* notes 39-41 and accompanying text. The Special Master also maintains apparent veto power over any Personal Representative's distribution of an award. The Personal Representative is obligated to produce a distribution plan to the Special Master prior to any such distribution and, "in the event that the Special Master concludes that the Personal Representative's plan for distribution does not appropriately compensate the victim's spouse, children, or other relatives, the Special Master may direct the Personal Representative to distribute all or part of the award to such spouse, children, or other relatives." § 104.52. Again, one potentially knotty scenario is where the victim was not legally divorced and at the time of her death had a same-sex partner, in which case the Special Master may, at his discretion, opt to overturn or reduce an award to a same-sex partner in favor of the spouse.

196. The non-recognition of same-sex partners is only one of many criticisms that have surfaced with respect to the drafting and execution of the FVCF. The FVCF has been criticized on the grounds that it was created to limit costs to the government, see

to the initial Notice of Inquiry and Advanced Notice of Rulemaking regarding the FVCF, a collective of gay rights advocates requested that the Special Master recognize unmarried but committed same-sex partners of victims.<sup>197</sup> Gay rights advocates' fears were confirmed when the Special Master, Kenneth Feinberg, confirmed to the press that he would not make payments to same-sex partners if they were unrecognized under state intestacy laws.<sup>198</sup>

Fears were dispelled, however, when the FVCF made its first documented award to the same-sex partner of a September 11, 2001 victim.<sup>199</sup> The same-sex partner of a victim of the attack on the Pentagon received a lump sum award of \$557,390. She is a resident, as was her partner, of Maryland, where the state's wrongful death statute

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David W. Chen, *Victims' Kin Find Fault with Overseer of 9/11 Fund*, N.Y. Times, Nov. 13, 2002, at B1, and that the determination is performed by one person using flawed criteria to determine compensation amounts which results in significantly diminished payouts; see David W. Chen, *A Slow, Deliberate Process of Judging 9/11 Victim Awards*, N.Y. Times, Feb. 18, 2003, at B1 ("He's like the Wizard of Oz." (quoting a lawyer representing one family)).

197. The groups, including the Lambda Legal Defense Fund and ESPA, demanded that "the Department . . . include among relatives eligible for compensation those who lost their life partners or *de facto* parents or children, regardless of sexual orientation and marital status." Letter from the Lambda Legal Defense Fund, Human Rights Campaign, Empire State Pride Agenda, Gay and Lesbian Advocates and Defenders, National Center for Lesbian Rights, and the National Gay and Lesbian Task Force, to the Department of Justice (Nov. 21, 2001), *available at* <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=919>. The groups urged the Department to evaluate eligibility for an individual claiming compensation based on a "family relationship of mutual interdependence." *Id.*

198. Mr. Feinberg said the following on *Meet the Press* on March 10, 2002:

[Gays and lesbians] are left out of my program to the extent that their own state doesn't include them. I cannot get into a position in this program . . . second-guessing [how] the state of New York or . . . Massachusetts . . . or Virginia or New Jersey . . . treat[s] same-sex partners, domestic live-ins, etc. . . . If your state law makes you eligible, I will honor state law. If it doesn't, I go with the state.

Final Rule Comment R000201 (quoting Kenneth Feinberg), *available at* <http://www.usdoj.gov/victimcompensation/final/rmar14/R000201.html> (last visited Apr. 4, 2004) [hereinafter Comment R000201]. Thereafter, comments to the Final Rule questioned Feinberg's comments and their rationale. *See id.*; Final Rule Comment R001399, *available at* <http://www.usdoj.gov/victimcompensation/final/rmar21/R001399.html> (last visited Apr. 4, 2004). One comment noted that the government would award benefits to illegal aliens, but would not consider awarding same-sex partners where the applicable state law would be prohibitive. *See id.* Arguably, it was these comments and the subsequent responses that helped propel Governor Pataki and the New York State Legislature to amend its intestacy laws for the purpose of influencing Feinberg's award-making decisions for New York State citizens. *See infra* note 231 and accompanying text; *see also* Gross, *supra* note 15 ("In less clear-cut situations, Mr. Feinberg added, he will take into account that New York's leaders, in a variety of post-9/11 actions, 'have tried to improve the likelihood that I can exercise my discretion and I will do my best.'").

199. *See* Sheryl McCarthy, *Still, a Small Price to Pay for Lifetime Partner*, Newsday, Jan. 27, 2003, at A22; Steve Vogel, *U.S. Awards Lesbian 9/11 Compensation for Loss of Partner*, Wash. Post, Jan. 23, 2003, at B1.

would not have recognized the relationship. Because the victim had left a will granting everything to her partner, with her partner named the executor of her estate,<sup>200</sup> application of Maryland's estates law made the partner the beneficiary. While a great victory for same-sex couples, the first award to a same-sex survivor does not diminish the problems faced by couples without wills—a problem not applicable to married couples who take under state intestacy laws.

b. *Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002*

In June 2002, Congress passed the Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002.<sup>201</sup> The Act authorizes the payment of \$250,000 to the beneficiary named in a police officer or firefighter's life insurance policy, provided there is no surviving spouse or child.<sup>202</sup> Mychal F. Judge was a gay Franciscan Priest and Chaplain to the New York City Fire Department who was killed during the September 11, 2001 attacks.<sup>203</sup> Prior to the legislation's passage, this federal payment was only authorized to the spouse, children, or parents of the firefighter or police officer. The amendment allows for payment to same-sex partners provided they are the named beneficiary of the deceased under the insurance policy. While the scope of the legislation is limited, it will apply to all future police officers and firefighters, not just those who died on September 11, 2001.<sup>204</sup>

## 2. New York State Legislation

While New York City and, to a lesser degree, other municipalities in New York State have been national leaders in the recognition and support of same-sex couples, progress at the state level has been much slower and less comprehensive.<sup>205</sup> Indeed, it has been characterized as

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200. See McCarthy, *supra* note 199.

201. Pub. L. No. 107-196, 116 Stat. 719 (2002) (to be codified at 42 U.S.C. §§ 3711, 3796, 3796b).

202. 42 U.S.C. § 3796.

203. See Daniel J. Wakin, *Killed on 9/11, Fire Chaplain Becomes Larger than Life*, N.Y. Times, Sept. 27, 2002, at A1. The legislation was criticized by the conservative right. See Becker, *supra* note 46, at 230-31; Elisabeth Bumiller, *Washington Memo; The Most Unusual Story Behind a Gay Rights Victory*, N.Y. Times, June 27, 2002, at A25.

204. § 2(c), 116 Stat. at 720.

205. For example, a nondiscrimination law based on sexual orientation was passed in New York in December 2002, more than thirty-one years after it was first proposed in the state legislature. 2002 N.Y. Laws 2 (codified at N.Y. Exec. Law § 292(27), 296 (McKinney Supp. 2004)). While New York City has, arguably, been a municipal leader for gay rights, a multitude of prejudices and other problems still exist. For one discussion of gay rights in New York City before 9/11, see Symposium, *Does New York City Look Different to You? The Changing Legal Landscape of Queer New*



slow but steady.<sup>206</sup> While same-sex couples won a few victories, they remained generally disenfranchised. September 11, 2001 and the legislation that followed, however, changed things significantly:

[I]t took September 11 for the New York State Legislature to finally recognize [Lesbian, Gay, Bisexual and Transgender] relationships and families . . . . These laws, the first of which included the term “domestic partner” for the very first time in law in the history of New York State, covered New York State’s views on eligibility for the 9/11 Federal Fund, Workers’ Compensation benefits and eligibility for college scholarships.<sup>207</sup>

Pronouncements like this demonstrate the importance of September 11, 2001 in recognizing the relationships of same-sex couples in New York.

Shortly after New York passed legislation criminalizing certain terrorist acts, New York introduced legislation aiding the September 11, 2001 victims’ families and, in doing so, directly confronted the historic precedent of ignoring same-sex couples in New York State’s laws.<sup>208</sup> Legislative change has come slowly—although steadily—in New York; however, before September 11, 2001 the state had not recognized “domestic partners” in any law.<sup>209</sup> After September 11, 2001 that changed. Governor George Pataki issued fifty-six Executive Orders in response to the terrorist attacks—all under an initial Executive Order declaring a disaster emergency in New York.<sup>210</sup> The Executive Orders applicable to couples affected by the attacks recognized and protected same-sex couples for the first time.

Legislation passed in New York—the home of the majority of the victims<sup>211</sup>—immediately concentrated on expanding the scope of the

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*York City*, 26 N.Y.U. Rev. L. & Soc. Change 139, 140 (2000-01) (“The question that this panel is going to address today is, ‘How queer friendly is New York City in the current political landscape?’ The answer seems to be that it depends on what type of queer New Yorker you are.”).

206. ESPA recently called the State’s progress slow but steady, whereby it “cobble[d] together a set of rights and responsibilities . . . [by] recogniz[ing] and support[ing] families formed by lesbian and gay people . . . [t]hrough a jumble of courts decisions, statutes, executive orders, policies, regulations and agency interpretations.” Press Release, Empire State Pride Agenda, Gay Families Winning Legal Protection Incrementally in NY State (Apr. 24, 2003), *at* <http://www.prideagenda.org/pressreleases/pr-04-24-03.html>.

207. *Id.* ESPA’s Executive Director, Matt Foreman, went on to say that “While the current patchwork of protections our families have won here in New York State is clearly not enough, this progress proves that our quest for full equality is well underway and will not be stopped.” *Id.*

208. One man who had lost his partner summed up his status prior to the passage of protections: “If you’re straight and have a marriage license, it’s one, two, three . . . . We’re clawing at it, just to be acknowledged.” Lee, *supra* note 33.

209. See *infra* notes 245-48 and accompanying text.

210. Exec. Order No. 112.1, 2001 N.Y. Laws 1185.

211. According to one estimate, 1,747 of the 2,996 victims were New York State residents. September 11, 2001 Victims Website, *at*

state's Penal Law to encompass terrorist crimes.<sup>212</sup> In addition to criminal legislation, the State Legislature quickly passed legislation benefiting the families of the victims of September 11, 2001. It was through these laws that New York took its greatest strides toward recognizing same-sex couples.

a. *Crime Victims Board Extended to Same-Sex Partners—A “Matter of Grace”*

New York State's first post-September 11, 2001 measure directed to same-sex partners of victims of the tragedy was Governor Pataki's issuance of an Executive Order on October 11, 2001 awarding domestic partners the same standing as heterosexual spouses for payments made to victims' families by the State Crime Victims Board.<sup>213</sup> This was likely Governor Pataki's first of many other actions benefiting domestic partners because of the short time frame imposed upon victims' dependents to proffer evidence of loss and eligibility for payment. Indeed, time was of the essence.

Crime victims' compensation acts provide governmental compensation to the families of crime victims to help them with the out-of-pocket costs and loss of earnings or support they suffer.<sup>214</sup> New York's version of this scheme states that its intent is to “aid, care [for] and support . . . as a matter of grace . . . such victims of crime.”<sup>215</sup>

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[http://www.september11victims.com/september11victims/country\\_citizenship.htm](http://www.september11victims.com/september11victims/country_citizenship.htm) (last visited Mar. 28, 2004).

212. To that end, on September 17, 2001, New York State passed the Anti-Terrorism Act of 2001, 2001 N.Y. Laws 300, which primarily amended the Penal Law to include several terrorist crimes. N.Y. Penal Law § 490.00 (McKinney Supp. 2004). On November 1, 2001, New York State Governor George Pataki and State Attorney General Eliot Spitzer proposed additional legislation that would primarily supplement the Penal Law to account for further terrorist crimes. See Press Release, Office of New York State Governor George Pataki, Governor Pataki, Attorney General Spitzer Announce Comprehensive New Anti-Terrorism Legislation (Nov. 1, 2001), at [http://www.state.ny.us/governor/press/year01/nov1\\_1\\_01.htm](http://www.state.ny.us/governor/press/year01/nov1_1_01.htm). The proposed legislation later became the Terrorism Article in the New York Penal Code. N.Y. Penal Law § 490 (McKinney Supp. 2004). “[T]he legislature finds that our laws must be strengthened to ensure that terrorists, as well as those who solicit or provide financial and other support to terrorists, are prosecuted and punished in state courts with appropriate severity.” *Id.*

213. 2001 N.Y. St. Reg., No. XXIII, at 85. The Executive Order amended the subsection of the Crime Victims Board Law that defined as eligible those claimants considered to be a “dependent” of a deceased crime victim. N.Y. Exec. Law § 624(1)(c) (McKinney 1996 & Supp. 2004).

214. See generally Andrea G. Nadel, Annotation, *Statutes Providing for Governmental Compensation for Victims of Crime*, 20 A.L.R.4th 63, 66-69 (1983). The compensation is paid by government-appointed tribunals or boards that conduct evidentiary hearings and determine the amount of payments—which are usually capped by statute—made to claimants. See *id.*

215. N.Y. Exec. Law § 620 (McKinney 1996). The New York courts have made clear, in at least one instance, that where the claimant cannot produce adequate evidence of true economic loss, “[t]here is no legal right to be awarded the aid but

Because same-sex partners were not explicitly named as potential beneficiaries under the New York Crime Victims Board Law (prior to the Executive Order or after the Executive Order), a partner traditionally had to argue that he or she was a surviving spouse<sup>216</sup> or another “person dependent for his principal support upon a victim of crime who died as a direct result of such crime.”<sup>217</sup> While same-sex partners had some success making these arguments, they nonetheless had to resort to the courts to make a challenge, as opposed to spouses who recovered automatically.<sup>218</sup> Today, however, that query is moot due to the Executive Order.

Executive Order Number 113.30<sup>219</sup> modified the Crime Victims Board Law in two ways. First, it temporarily suspended the dependent’s requirement to show “principal support” on a victim, provided the dependent demonstrate a unilateral dependence on the victim or a mutual interdependence between them.<sup>220</sup> Second, it directed the Board to amend its definition of “principal support” from seventy-five percent to fifty percent.<sup>221</sup> While these changes do not mention “same-sex partner,” “domestic partner,” “homosexual partner” or any similar terminology, the Governor made clear in comments to third parties that his intent in issuing the Order was to use the same criteria for gay and lesbian survivors as is used for

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rather, it is granted explicitly ‘as a matter of grace.’” *Rigaud v. Crime Victims Comp. Bd.*, 461 N.Y.S.2d 840, 842 (App. Div. 1983); *see also Starkman v. Fischetti*, 675 N.Y.S.2d 703, 704 (App. Div. 1998) (noting that monetary assistance is a matter of grace).

216. § 624(1)(b).

217. *Id.* § 624(1)(c).

218. In one case where a partner argued he was a spouse, the New York Supreme Court, Appellate Division, in *Secord v. Fischetti*, 653 N.Y.S.2d 551 (App. Div. 1997), declined to hold as unreasonable the Crime Victims Board decision that the term “surviving spouse” does not extend to include a homosexual life partner. *Id.* at 552. The petitioner also challenged the decision on the grounds that he fell into the dependent spouse category. His claim was denied not on the ground of the sex of the parties, but upon a determination that he had not received a “majority of his support” from the deceased partner. *Id.* The court’s willingness to make a determination based on the parties’ salaries and interdependent support was evidence that same-sex partners were not completely precluded from recovery; however, their recovery was not automatic under the “spouse” rule.

219. Exec. Order No. 113.30, 2001 N.Y. St. Reg., No. XXIII, at 85.

220. *Id.* The Order states that:

[S]uch dependent person shall be eligible for awards upon a showing of unilateral dependence or mutual interdependence upon such a victim, which may be evidenced by a nexus of factors, including but not limited to common ownership of property, common householding, shared budgeting and the length of the relationship between such person and the victim.

*Id.*

221. *Id.* In a *New York Times* article preceding the Executive Order, at least one private organization (“Safe Horizon”) said that it would make grants to otherwise ineligible family members, including “a person whose domestic partner died in the attack.” Richard Pérez-Peña, *A Nation Challenged: The Clearinghouse; Service Center Offers Help to the Victims of Terrorism*, N.Y. Times, Sept. 24, 2001, at B10.

spouses when determining payments to surviving partners of September 11, 2001 victims.<sup>222</sup> As a result of the Governor's action same-sex and heterosexual unmarried partners became eligible—without the prior economic support restraints—for up to six hundred dollars per week with a cap of thirty thousand dollars.<sup>223</sup> On October 17, 2002, the Crime Victims Board, with the support of Governor Pataki, extended the previously issued Executive Order to *all* qualifying partners (same-sex and opposite-sex) of homicide victims going forward.<sup>224</sup> This extension exemplifies how a law specific to September 11, 2001 spun into something greater, thereby providing long-term benefits to same-sex couples.<sup>225</sup>

b. *The September 11th Victims and Families Relief Act*

On May 21, 2002, New York passed the September 11th Victims and Families Relief Act,<sup>226</sup> which assists victims' survivors in seeking relief and damages available to them under the FVCF.<sup>227</sup> Among other things, it is intended to make New York State citizens who are domestic partners of victims eligible for payments. Its first function is to prohibit insurers or any other third-party payors from asserting

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222. Press Release, Empire State Pride Agenda, Governor Pataki Speaks Out in Support of SONDA (Oct. 16, 2001), at <http://www.prideagenda.org/pressreleases/pr-10-16-01.htm>. Governor Pataki went on to say, "There are things that are incredibly important to us as a society and one of those things is our freedom and part of that freedom is letting people live their lives as they deem appropriate, and not having government tell them what to do." *Id.* While obviously not legally binding, the Governor's explanation had a pragmatic benefit because it made clear that the legislation was intended to benefit same-sex couples. It also stands as a symbolic victory if in the future it is viewed as a signal of change. ESPA heralded the step, noting that the order represents "the first official step taken by any level of government in the nation to address the inequities faced by gay and lesbian survivors of the terrorist attacks in obtaining benefits." See Press Release, Empire State Pride Agenda, Gay Rights Organization Praises Governor Pataki for Order Granting Equal Benefits to Gay Partners of those Killed in WTC Attacks (Oct. 12, 2001), at <http://www.prideagenda.org/pressreleases/pr-10-12-01.html>.

223. N.Y. Exec. Law § 631(3) (McKinney Supp. 2004).

224. The effect of the extension was to "erase[] the 50% income dependency requirement for gay partners and provide[] eligibility, just as it does for spouses, regardless of the degree of their dependence on the deceased." See Press Release, Empire State Pride Agenda, NY State Crime Victims Board Extends Equal Benefits to Surviving Domestic Partners of Homicide Victims: Makes Governor Pataki's 9/11 Executive Order Applicable to All Partners (Oct. 17, 2002), at <http://www.prideagenda.org/pressreleases/pr-10-17-02.html> [hereinafter Crime Victims Press Release].

225. ESPA claimed that "[o]nce the CVB . . . understood the damaging impact of [its] policies on the lives of people who happened to be lesbian and gay and were suffering like anyone else after 9/11, [it] understood the need [to] put in place a more equitable approach to how financial assistance is provided." *Id.*

226. 2002 N.Y. Laws 73 (codified at N.Y. Workers' Comp. Law § 29, 1-b (McKinney Supp. 2004)).

227. Pub. L. No. 107-42, 115 Stat. 230, 237 (2001) (codified at scattered sections of U.S.C.). For a discussion of the FVCF, see *supra* Part I.C.1.a.

liens on awards made under the FVCF, or reducing any payouts based upon a beneficiary's claim from the FVCF.<sup>228</sup> Second, it insulates the personal representative (as defined in the FVCF) of a victim from liability if exercising good faith steps in connection with deciding whether to make a claim and, if so, in making that claim.<sup>229</sup> Lastly, it makes awards under the FVCF in New York State tax-exempt.<sup>230</sup> Of most significance to same-sex partners of September 11, 2001 victims, the "Legislative intent" provision in the Act states that the Special Master of the FVCF, who is required thereunder to look to the victim's state's intestacy laws to determine who is eligible for relief, should make eligible those New York State citizens who are domestic partners of victims.<sup>231</sup>

In its memorandum in support of passage of the bill, the New York State Senate claimed: "[t]his legislation does not make any changes to New York State law on this issue, because [the federal Air Transportation Safety and System Stabilization Act] and the implementing regulations already indicate that the domestic partners are eligible to receive compensation from the Fund."<sup>232</sup> However, the FVCF neither explicitly indicates that domestic partners are eligible, nor was its silence on the issue ever reasonably interpreted to mean that domestic partners would be covered.<sup>233</sup> Consequently, the Senate stretches somewhat its argument when, with the purpose of supporting its contention, it notes that the rationale behind the Fund is to compensate "relatives" of the deceased,<sup>234</sup> and that the legislative

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228. N.Y. Workers' Comp. Law § 29, 1-b.

229. N.Y. Est. Powers & Trusts Law § 11-4.7(e) (McKinney Supp. 2004).

230. 2002 N.Y. Laws 73, § 7.

231. *Id.* at § 1. The provision states:

[T]hat domestic partners of victims of the terrorist attacks are eligible for distributions from the federal victim compensation fund, and the requirements for awards under the New York State World Trade Center Relief Fund and other existing state laws, regulations, and executive orders should guide the federal special master in determining awards and ensuring that the distribution plan compensates such domestic partners for the losses they sustained.

*Id.* In a press release, ESPA explained the source of the intent section:

This language is the result of extensive negotiations between the Attorney General's and the Governor's offices with the Empire State Pride Agenda in consultation with Lambda Legal Defense and Education Fund. The Pride Agenda hopes that this provision will help give Special Master Kenneth Feinberg an additional basis in law to distribute federal fund awards to surviving same-sex partners living [in] New York State.

Press Release, Empire State Pride Agenda, New York State's Leadership Introduces Joint Bill that Takes Additional Steps Supporting Family Members of 9/11 Victims (May 2, 2002), at <http://www.prideagenda.org/pressreleases/pr-5-1-02.html> [hereinafter Joint Bill Press Release].

232. Senate Memorandum in Support, 2002 N.Y. Laws 73, at 1710.

233. See *supra* notes 197-200 and accompanying text (discussing Special Master Kenneth Feinberg's response to requests that the FVCF be eligible to same-sex partners of victims).

234. Senate Memorandum in Support, 2002 N.Y. Laws 73, at 1710.

history's references to "families" of victims are surreptitious allusions to domestic partners.<sup>235</sup> The Senate's subsequent support for the Act is more persuasive where it cites the codification of *Braschi* and Executive Order 113.30: "New York State has indicated in several contexts that individuals in committed relationships are considered to be 'family members.'"<sup>236</sup> This statement is more decisive proof that New York intended to build on prior recognition of same-sex couples by including them under the FVCF.

### c. World Trade Center Memorial Scholarship Program

On September 21, 2001, Governor Pataki issued Executive Order No. 113.21, directing the Board of Trustees of the State University of New York and the City University of New York to establish scholarship programs to the "innocent victims, and the spouses and children of the innocent victims," of September 11, 2001.<sup>237</sup> The Order did not include "domestic partners," "financial dependents," or the like. However, on September 23, 2002, Governor Pataki signed into law the World Trade Center Memorial Scholarship Program,<sup>238</sup> which granted scholarships to a varied class of people affected by September 11, 2001, including those who were "financial dependent[s]" of victims.<sup>239</sup> A financial dependent is defined as someone who can show unilateral or mutual interdependence upon a victim, which may be evidenced by criteria seen in the preceding laws.<sup>240</sup> This definition uses the same indicia to determine a financial dependent as used in Executive Order 113.30<sup>241</sup> as well as the 2002 amendment to New York's workers' compensation law.<sup>242</sup> The

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235. *Id.*

236. *Id.* ESPA argued that the intent language was important because Special Master Feinberg was required to defer to state law in making his determination of awards and Special Master Feinberg has been encouraged "to read this language as a clear signal that as far as New York is concerned all who have lost a loved one on September 11 have suffered equally and should therefore be treated equally." See Joint Bill Press Release, *supra* note 231. ESPA noted that of the twenty-one known surviving lesbian and gay partners of victims of September 11, eleven lived in New York State and, consequently, could benefit from the provision. *Id.* While happy that progress was made, ESPA was frustrated that these benefits were limited to one class of people: "While we are disappointed that government has failed to pass legislation that [has] been submitted this year and in year's past that puts in place permanent changes in law for same-sex partners . . . . We recognize that this is at least a small but important step forward." *Id.*

237. Exec. Order No. 113.21, 2001 N.Y. Laws 1202.

238. 2002 N.Y. Laws 176 (codified at N.Y. Educ. Law §§ 601(5)(6)(7), 608, 668-b, -d (McKinney Supp. 2004)).

239. N.Y. Educ. Law § 601(7).

240. *Id.* The criteria are comprised of "a nexus of factors, including but not limited to common ownership of property, common householding, shared budgeting and the length of the relationship between the financial dependent and such individual." *Id.*

241. See text accompanying *supra* note 219.

242. See *infra* note 248 and accompanying text.

consistent use of the definition in the Executive Orders, which builds upon similar definitions already established in New York law governing family members' succession rights to apartments,<sup>243</sup> evidences New York's evolution in broadening its definition of families to include same-sex couples.

#### d. *Workers' Compensation Amendment*

In response to the legal challenge made by Larry Courtney, the same-sex partner of a victim,<sup>244</sup> the New York State Assembly and Senate unanimously passed an amendment to the State Workers' Compensation Law making the "domestic partners" of September 11, 2001 victims eligible for workers' compensation benefits.<sup>245</sup> Of greatest significance to the same-sex partners of victims, this law expressly defines a "domestic partner" as eligible,<sup>246</sup> rather than using the term "financial dependent," which was used in some of the preceding laws and Executive Orders.<sup>247</sup> The law defines a "domestic partner" as (1) an individual who is registered as the domestic partner of a victim with an employer or municipality or (2) a dependent of a victim who can demonstrate: "unilateral dependence or mutual interdependence, as evidenced by a nexus of factors including, but not limited to, common ownership of real or personal property, common householding, children in common, signs of intent to marry, shared budgeting, and the length of the personal relationship with the employee."<sup>248</sup> This recognition of "domestic partners" represents the most significant step taken by New York State in its post-September 11, 2001 lawmaking.

Generally, workers' compensation statutes obligate employers to compensate their employees for certain injuries suffered on the job, regardless of fault.<sup>249</sup> Prior to its amendment, New York Workers'

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243. See N.Y. Comp. Codes R. & Regs. tit. 9, § 2520.6(o)(2) (2001).

244. See *supra* notes 1, 5-6 and accompanying text.

245. 2002 N.Y. Laws 467 (codified at N.Y. Workers' Comp. Law § 4 (McKinney Supp. 2004)).

246. N.Y. Workers' Comp. Law § 4(1). The definition of "domestic partner" used in Chapter 467 is identical to the one used in Chapter 468, a law passed on August 20, 2002 with the purpose of compensating the "domestic partners" of firefighters killed on September 11, 2001. 2002 N.Y. Laws 468. Specifically, the law grants to a named class of deceased firefighters' "domestic partners" the same special accidental death benefit previously payable only to spouses. N.Y. Gen. Mun. Law § 208-f (McKinney 1993 & Supp. 2004).

247. See text accompanying *supra* notes 220, 239-40.

248. N.Y. Workers' Comp. Law § 4(1).

249. See generally 82 Am. Jur. 2d *Workers' Compensation* § 1 (2003). The statutes set forth the damages payable to employees injured on the job as well as the hierarchy of eligible beneficiaries in the event of death—in which case, "death benefits" are distributed. See, e.g., N.Y. Workers' Compensation Law § 16 (McKinney 1993). These benefits also include certain funeral expenses, the cost of which are to be determined by the Workers' Compensation board. *Id.* § 16(1).

Compensation Law paid out death benefits to a decedent's spouse and children<sup>250</sup> and, in the event neither existed, payment went to parents, grandparents, and brothers and sisters under the age of eighteen, provided they could prove dependency.<sup>251</sup> In the event there were no such beneficiaries, the award went to the estate.<sup>252</sup> Committed same-sex partners are absent from this list. Because workers' compensation statutes are designed to act as an economic safety cushion for individuals financially dependent on a victim,<sup>253</sup> their intent is stymied when a same-sex partner—dependent on a victim as if the victim were his or her spouse—is not considered eligible for recovery.<sup>254</sup>

For New York State citizens who lost same-sex partners on September 11, 2001, their recovery is now automatic, provided they were registered in a domestic partnership registry (of any kind), or can evidence the requisite unilateral or mutual interdependence, and provided they do not have a legal spouse from a prior marriage.<sup>255</sup> The payout amount depends on the decedent's salary and can be as high as \$20,800 per year, and continues in perpetuity.<sup>256</sup> Needless to say, the pecuniary benefit to a widow or widower is significant.

Despite this tremendous victory, Larry Courtney later articulated the problem that seemed apparent to many: Why should such treatment be limited to such a small group of victims when other

250. *Id.* § 16(1)-(3). In all of the payment scenarios, dependent children are defined as children under the age of eighteen, or, if a full-time student, under the age of twenty-three, regardless of whether they were supported by the decedent. *Id.*

251. *Id.* § 16(4).

252. *Id.* § 16(4)-b.

253. See Am. Jur. 2d, *supra* note 249, at § 5.

254. Other jurisdictions do, however, interpret the "dependency" requirement more liberally. For example, in California, the dividing line for dependency is not cut along blood lines, but, rather, along a "good faith" family member standard: "No person is a dependent of any deceased employee unless in good faith a member of the family or household of the employee, or unless the person bears to the employee the relation of husband or wife, child, posthumous child, adopted child or stepchild, grandchild . . ." Cal. Lab. Code § 3503 (West 2003). Thus, a woman living in a committed relationship—as evidenced by the joint occupation of a residency, the pooling of individual assets and use of joint bank accounts—with a man who had not divorced her husband with whom she no longer lived, is considered a "good faith" family member. See *Dep't of Indus. Relations v. Workers' Comp. Appeals Bd.*, 156 Cal. Rptr. 183, 187 (Ct. App. 1979). However, dependency is not established, per se, when same-sex couples occupy the same residence. When two men live together but evidence is not proffered to illuminate a financial dependency between the two, dependency does not lie. See *Donovan v. Workers' Comp. Appeals Bd.*, 187 Cal. Rptr. 869, 873 (Ct. App. 1982) ("Merely because two persons of the same sex occupy a single residential structure does not dictate either the sexual influences or dependency within the meaning of the code. It is necessary however for the Board to determine the primal issue of dependency status made to a petitioner.").

255. Realistically, this second requirement can be problematic for those who never legally divorced prior spouses. For an example, see Gross, *supra* note 15.

256. See Press Release, Empire State Pride Agenda, State Legislature Approves Workers Compensation Benefits for 9/11 Same-Sex Survivors (June 26, 2002), at <http://www.prideagenda.org/pressreleases/pr-6-26-02.html>.



same-sex couples are denied these benefits everyday? He said: "This is good for some of us, but we have to do more for all of us. People whose partners died in other tragedies on the job are still fighting with insurance companies for the basic benefits that were intended for families in our situation."<sup>257</sup> This question applies not only to workers' compensation but other types of financial support, such as survivor benefits.

#### D. *Post-September 11, 2001 Debate Exposes the Conflict Over the Legal Treatment of Same-Sex Couples*

This section describes how commentators for and against the post-September 11, 2001 lawmaking responded. The differences in opinion demonstrate that some people applauded the laws while others assailed them, claiming they are the result of opportunistic individuals pushing an "agenda" that has gone too far.

Among the media coverage surrounding the September 11, 2001 terrorist attacks were the disclosures of personal stories of same-sex couples affected by the tragedy. Through the media stories of gay and lesbian couples surfaced—and the resulting legislation affecting them—that many citizens had never seen or heard before: "Together these efforts and advances spotlighted for the nation the institutional difficulties lesbian and gay families face living their lives on a daily basis and re-ignited the debate over the need for relationship recognition by government of families headed by same-sex partners."<sup>258</sup> The foregoing quote is illustrative of the possibility that September 11, 2001 gave many people their first exposure to the reality of same-sex couples' lives and the hardships they face when marriage-based rights are absent. Such awareness "re-ignited" the debate over same-sex couples' legal recognition. Further,

The tragedy of Sept. 11 . . . affirmed some trends and traits that are sources of pride, while . . . also . . . *discovering and facing others* that reveal our fragility and intolerance. Nowhere is this more evident than with our humane, yet controversial, treatment of gay men and lesbians who lost partners on that horrible day.<sup>259</sup>

The idea that people "discovered" the existence of same-sex couples and gay and lesbian victims for the first time after September 11, 2001 was not uncommon.<sup>260</sup> Past isolated events often have raised

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257. Press Release, Empire State Pride Agenda, *supra* note 6.

258. See Crime Victims Press Release, *supra* note 224; see also Hank Stuever, *The Bomb with a Loaded Message: For Gays in America, Even Heroism Isn't a Ticket to Inclusion*, Wash. Post, Oct. 27, 2001, at C1 ("We're not in 'Leave It to Beaver' land anymore. There are all kinds of families who don't fit the government's definition of family, who need help and won't be able to get it.").

259. Bill Maxwell, *Gay Survivors of the Sept. 11 Tragedy Deserve Death Benefits*, St. Petersburg Times, June 2, 2002, at 1D (emphasis added).

260. See Evelyn Nieves, *Passenger on Jet: Gay Hero or Hero Who Was Gay?*, N.Y.

the recognition of same-sex couples and the difficulties they face. These isolated events, however, rarely gain critical mass and more often lead to ad hoc court judgments and lawmaking that aid same-sex couples, albeit in a very discrete sense.<sup>261</sup> The legislative response to September 11, 2001 was recognized as a departure.<sup>262</sup>

Media coverage was not limited to those in support of extending civil rights to same-sex couples; commentators arguing against the recognition of same-sex couples were numerous. Louis Sheldon, the founder and chairman of the Traditional Values Coalition, said that neither the government nor private relief agencies should have provided assistance to the same-sex partners of September 11, 2001 victims. He claimed that, with respect to gay rights organizations lobbying for aid, "[t]hey are taking advantage of this national tragedy to promote their agenda,"<sup>263</sup> that private relief groups "should be first giving priority to those widows who were at home with their babies and those widowers who lost their wives,"<sup>264</sup> and that "assistance should be given on the basis and priority of one man and one woman in a marital relationship."<sup>265</sup> He went on to state that gay rights organizations were using the tragedy to redefine marriage.<sup>266</sup> Rev. Jerry Falwell and Pat Robertson assessed blame for the attacks on, among others, gays and lesbians: "I really believe that the . . . gays and the lesbians who are actively trying to make that an alternative lifestyle . . . all of them who have tried to secularize America, I point the finger in their face and say, 'You helped this happen.'"<sup>267</sup> These

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Times, Jan. 16, 2002, at A12 ("Maybe because of the lack of visible heroes for us, there's a greater significance in finding heroes.").

261. The Empire State Pride Agenda supports this theory. See Empire State Pride Agenda, State of the State Report 2003, at 13-16 (2003), available at <http://www.prideagenda.org/stateofstate/2003/legalstatus.pdf>.

262. See Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 Chi.-Kent L. Rev. 785 (2003). Professor Nancy E. Dowd argued:

Our response to 9/11, it seems to me, has been to embrace all who have lost and thereby to embrace the most fluid, flexible, relational view of family. It is a definition of family founded in love and emotion, acts and history, rather than status or formality. At least on this occasion, we have forgotten our objections to nontraditional families and embraced a definition of family based on emotional connection. Perhaps we have witnessed a transformation.

*Id.* at 799.

263. Thomas B. Edsall, *Minister Says Gays Should Not Get Aid*, Wash. Post, Oct. 5, 2001, at A22.

264. *Id.*

265. *Id.*

266. *Id.* Two days after the attacks Reverend Pat Robertson asserted that an "angry God" had allowed the terrorists to succeed because, among other reasons he proposed, the United States had become a nation of abortion, homosexuality, secular schools and courts, and the American Civil Liberties Union. See Nieves, *supra* note 260.

267. Laurie Goodstein, *After the Attacks: Finding Fault; Falwell's Finger-Pointing Inappropriate, Bush Says*, N.Y. Times, Sept. 15, 2001, at A15. Jerry Falwell later

remarks illuminate both the recognition of what was happening to same-sex couples and the debate that ensued.<sup>268</sup> They elucidate the conflict between prior non-recognition and the new shift in treatment that enflamed Sheldon and others.

While gay rights groups' declarations of success, Governor Pataki's remarks and issuance of Executive Orders,<sup>269</sup> and the antagonistic remarks by certain members of the Christian right create a perception of substantial change, they are not conclusive. New York's legislation, however, is facially demonstrative of change because certain civil rights plainly did not exist for same-sex couples before September 11, 2001 but existed afterward.<sup>270</sup>

## II. STORYTELLING AND SOCIAL CHANGE

In Part I, this Comment outlined the general legal treatment of same-sex couples with an emphasis on such treatment in New York, including the treatment of the same-sex survivors of victims of September 11, 2001. The legislative events following September 11, 2001 exposed the need for change as existing laws confronted the modern realities of committed same-sex relationships. Change seemed to come relatively easily after years of obstinence from both the courts and legislators, albeit in a limited form directed toward a discrete number of people. While relatively limited, the change has been heralded as indisputably unique and politically successful, as same-sex surviving partners gained rights they were never privy to before.<sup>271</sup> These reforms in the legal treatment of same-sex couples raise the question of how September 11, 2001 affected lawmakers to spur them to act as they did. Were their views of same-sex couples fundamentally altered? The reforms also beg the question of what their long-term effects will be. Will history look back on the events as a footnote in the gay rights struggle, or as a significant turning point?

Part II.A. discusses how storytelling is used by legal commentators and practitioners to air the voices of disenfranchised groups. Storytelling is a tool that attempts to use the personal narratives of disenfranchised groups to provide a different perspective on the more dominant narratives inherent in the law.<sup>272</sup> Scholars argue that law is

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apologized for his remarks. See Gustav Niebuhr, *A Nation Challenged: Placing Blame; Falwell Apologizes for Saying an Angry God Allowed Attacks*, N.Y. Times, Sept. 18, 2001, at B4.

268. The debate did not cease after 9/11. As of September 2003, governmental officials—largely from the Republican Party—have proposed a constitutional amendment that would define “marriage” as a relationship solely between a man and a woman. See *infra* note 467.

269. See *supra* note 222.

270. See *supra* Part I.C.2.

271. See *supra* Part I.C.2.

272. See generally Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. Colo. L. Rev. 683 (1992); Richard Delgado, *Storytelling for Oppositionists and*

inherently narrative but that often only dominant “ingroup” narratives are heard.<sup>273</sup> Consequently, scholars call for non-dominant “outgroups” to embrace their own narratives to bring their voices to the forefront.<sup>274</sup> By doing so, storytelling can act as a tool to build community within outgroups, and as a method by which to enlighten and persuade others as to outgroups’ experiences.<sup>275</sup> Storytelling is a particularly powerful tool for same-sex couples, as they must tell their own stories to counter established and homophobic narratives.<sup>276</sup> The events of September 11, 2001 itself told many stories, including those of same-sex couples affected by the tragedy. Individuals, too, spoke out and articulated narratives that exposed the realities and hardships same-sex couples endure. These narratives played a role in the lawmaking that followed. Part II.B. introduces frameworks used by social scientists to evaluate how social change occurs. The literature explores the role of discrete events and how they often act as opportunities for a social movement to progress and change public opinion. September 11, 2001 is analogous to the types of events that sparked progress for other social movements in the past. Consequently, this literature provides a lens through which to evaluate the potential implications of September 11, 2001 on the legal treatment of same-sex couples.

### A. Storytelling

#### 1. Outgroups’ Use of Storytelling

Storytelling refers to the use of personal narrative to communicate a non-dominant perspective of the law.<sup>277</sup> At its core, storytelling premises that the law’s presumed objectivity and impartiality is illusory.<sup>278</sup> Proponents of storytelling argue that the law actually

*Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1988); Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574 (1987) (arguing that storytelling can induce empathy).

273. See Coombs, *supra* note 272, at 683-89 (arguing that traditional scholarship itself is what has spurred the creation of outsider scholarship); Delgado, *supra* note 272, at 2412-13, (dominant narratives “are like eyeglasses we have worn a long time”).

274. See Coombs, *supra* note 272, at 683-89; Delgado, *supra* note 272, at 2412-16.

275. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511, 516-22 (1992) (arguing that storytelling has an “inclusive” and “persuasive” function).

276. See William N. Eskridge, Jr., *Gaylegal Narratives*, 46 Stan. L. Rev. 607 (1994) (using examples of homosexuals in the military to demonstrate the value of storytelling); Fajer, *supra* note 275, at 516-22.

277. See generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 324 (1987) (calling for the adoption of unheard voices by “looking to the bottom”); Symposium, *Legal Storytelling*, 87 Mich. L. Rev. 2073 (1989).

278. See Coombs, *supra* note 272, at 684-85.

reflects a dominant majority vision that ignores the voices of traditionally marginalized groups, or "outgroups."<sup>279</sup> Consequently, what is perceived as normal or institutional is in reality a reflection of the elite's perspective and biases, which inherently ignores the realities of outgroups' experiences. The effect of "ingroup" dominance is a legal system impervious to the voices of others. Its dominance can lead to oppression. If you believe that "social reality is constructed,"<sup>280</sup> as proponents of storytelling do, the danger is clear. Individuals unknowingly believe that one particular set of narratives and experiences is reflective of experiences globally.<sup>281</sup> Most importantly, laws are created and interpreted through this assumed neutrality; in reality, the law is actually informed by subtle and more overt prejudices.<sup>282</sup>

Given this paradigm: "The attraction of stories for . . . [out]groups should come as no surprise."<sup>283</sup> Through storytelling, outgroups are able to both voice their stories and alternative perspectives "to subvert [commonly accepted legal] realit[ies]."<sup>284</sup> Proponents of storytelling contend that legal "objectivity" is an impossibility. They believe that the law is subjective and needs to be recognized as such. More importantly, outsider groups should embrace their own voices in order to posit themselves as antithetical to what is normative or accepted in the law and legal scholarship.<sup>285</sup>

Storytelling has two primary benefits. First, it allows outgroup members to strengthen themselves and build community by articulating what is common between them.<sup>286</sup> When outgroup members hear common stories from their peers, it strengthens their community. In addition, they begin to create and realize their own history.<sup>287</sup> Second, storytelling has the ability to persuade ingroups, and other individuals who are normally blind to what outgroups have to say, to become more empathetic.<sup>288</sup> By articulating a rarely heard voice, storytelling gives the establishment an insight into the particular outgroup's experience. Once a dominant ingroup understands that

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279. See Delgado, *supra* note 272, at 2412. Similarly, storytelling has been characterized as "outsider scholarship" contrasted against traditional scholarship. See Coombs, *supra* note 272, at 684-85. The majority has been characterized as a group of legal elites who are overwhelmingly white and male. See Eskridge, *supra* note 276, at 607.

280. See Delgado, *supra* note 272, at 2416.

281. See *id.*

282. See *id.* at 2413; Lin, *supra* note 22, at 746.

283. See Delgado, *supra* note 272, at 2412.

284. See *id.* at 2413.

285. See Coombs, *supra* note 272, at 684-85.

286. See Delgado, *supra* note 272, at 2414-15; Fajer, *supra* note 275, at 516-20.

287. See Fajer, *supra* note 275, at 517-18.

288. See *id.* at 521-22; Lin, *supra* note 22, at 749-50 ("The persuasive storyteller uses the story as a tool to illustrate abstract points and to evoke empathy from the listeners, in hopes of promoting a greater understanding of lesbian and gay culture.").

differing experiences exist, and then listens to them, the ingroup may be able to change its ways. Storytelling thus allows outgroups to persuade, change mindsets and chip away at prejudices.<sup>289</sup> The stakes are high because the power to persuade will impact how laws are created and interpreted. Indeed, it is the province of "common law judges [to] create abstract rules based on evaluation of individual stories."<sup>290</sup> It is no surprise, then, that storytelling has been embraced by outgroups and other political minorities challenging the status quo.<sup>291</sup>

Critical legal theorists and feminist scholars have embraced the use of storytelling to theorize that outside voices—particularly those of women and/or people of color—have been traditionally left out of legal discourse.<sup>292</sup> Outsiders argue that legal elites are comprised primarily of white heterosexual men. Moreover, because "[l]egal scholarship is inevitably narrative,"<sup>293</sup> scholars doubt whether such elites' stories "reflect social consensus or neutral values."<sup>294</sup> Narratives from the outside, which are infused with personal experiences and stories that "look[] to the bottom,"<sup>295</sup> provide a new lens through which to understand the law.<sup>296</sup> Storytelling is thus a political act used to raise consciousness within outgroups. At the same time, it persuades ingroup members to alter their views.<sup>297</sup>

Storytelling's applicability to gays and lesbians is clear. The traditional mistreatment of gays and lesbians warrants its application. Moreover, its potential to alter attitudes about gays and lesbians is strong. Indeed, gay and lesbian activists have embraced the use of storytelling in numerous ways and contexts.<sup>298</sup>

## 2. The Importance of Storytelling to Same-Sex Couples

Gays and lesbians are arguably the most disenfranchised of the disenfranchised, often discriminated against by groups who themselves are victims of discrimination.<sup>299</sup> This historic discrimination has resulted in the exclusion of gays and lesbians from many of the rights and privileges that others enjoy under the law.<sup>300</sup>

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289. See Fajer, *supra* note 275, at 521-22.

290. *Id.* at 521.

291. See Coombs, *supra* note 272, at 686-89.

292. *Id.* at 685-86.

293. Eskridge, *supra* note 276, at 607.

294. *Id.* at 608; see also Lin, *supra* note 22, at 746.

295. Matsuda, *supra* note 277, at 324.

296. See Eskridge, *supra* note 276, at 608; Lin, *supra* note 22, at 746.

297. See, e.g., Eskridge, *supra* note 276, at 614.

298. See, e.g., *id.* at 607-09; see also *infra* Part II.A.2.

299. See Lin, *supra* note 22, at 748 (citing Frank Browning, *The Culture of Desire: Paradox and Perversity in Gay Lives Today* 4 (1993)).

300. See *id.* at 751-58 (recounting the historic exclusion of gays and lesbians and anti-gay rhetoric).

The inability to marry,<sup>301</sup> and often times to adopt children,<sup>302</sup> are both clear examples of this exclusion. Legal scholars have argued that such exclusions are rooted in a deep history of stereotyping and reliance on false "understandings" about the lives of gays and lesbians and their relationships.<sup>303</sup>

Gays and lesbians have been excluded in large part because courts and lawmakers' "understanding" of gays and lesbians has consistently relied on narratives grounded in animus and misconception.<sup>304</sup> An individual's "understanding" of same-sex relationships often amounts to nothing more than a caricatured stereotype based on "pre-understanding."<sup>305</sup> The term "pre-understanding" has been used to refer to the scheme of beliefs a listener—particularly an ingroup member—has prior to actually hearing an outgroup member's story.<sup>306</sup>

Pre-understanding is damaging because, in effect, the listener supplants the speaker's words with his or her own.<sup>307</sup> Pre-understanding of gay and lesbian relationships arises in a wide range of scenarios, including assertions that gay men and lesbians are not and/or cannot be members of the armed forces,<sup>308</sup> that sexual activity defines being gay and precludes monogamy and child rearing,<sup>309</sup> that homosexuals "flaunt" their sexuality,<sup>310</sup> and that homosexuals embody characteristics of the other gender.<sup>311</sup> As harmful as reliance on pre-understanding may be generally, damage stemming from the courts' and lawmakers' reliance on certain pre-understandings is arguably worse.

Courts use their own narratives, which have important effects: "Courts must be cognizant that their decisions generate a narrative that dictates, to a large extent, social norms."<sup>312</sup> Unfortunately, courts have traditionally used their own dominant—and false—narratives to disenfranchise gay men and lesbians.<sup>313</sup> For example, the courts'

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301. See *supra* notes 26-38 and accompanying text.

302. See Lin, *supra* note 22, at 768-69.

303. See *id.* at 768-81. See generally Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 Tul. L. Rev. 529 (1996).

304. Backer, *supra* note 303, at 539 ("Traditionally, courts in the United States and Great Britain have had an extraordinarily difficult time dealing empathetically or intelligently with issues relating to the criminal regulation of sexual nonconformity (particularly adult, noncoercive sexual activity) . . . [including] cases which directly involve those quintessential sexual nonconformists—gay men and lesbians.")

305. See Fajer, *supra* note 275, at 524-25 (citation omitted).

306. See *id.*

307. See *id.*

308. See Eskridge, *supra* note 276, at 614-15.

309. See Fajer, *supra* note 275, at 537-46. Professor Fajer coins this phenomenon the "sex-as-lifestyle assumption." *Id.* at 537.

310. See *id.* at 571-91.

311. See *id.* at 607-24.

312. See Lin, *supra* note 22, at 766.

313. See generally Backer, *supra* note 303.

narratives in sexual conduct cases have created a jurisprudence brimming with stock narratives of homosexual men as “mythological figures of disgust.”<sup>314</sup> The result is that:

[f]or judges telling stories, and hearing stories in cases on a daily basis and over a number of years, the mass of this narrative makes it easy to believe that sexual nonconformists are almost invariably disgusting in some basic way . . . [and are] invariably linked to predator, pried piper, whore, and defiler.<sup>315</sup>

A prime example of this stereotype is *Bowers v. Hardwick*,<sup>316</sup> which has been heavily criticized for taking a blind eye to the actual facts of the case and simply relying on stock stories about gay men.<sup>317</sup> Indeed, commentators have lambasted *Bowers* for failing to view the defendant as a human being at all.<sup>318</sup>

Another example of a damaging narrative takes place in the context of gays in the military. Professor William Eskridge has discussed the use of narrative in the context of the U.S. government’s creation of its “Don’t Ask, Don’t Tell” policy.<sup>319</sup> In congressional hearings that contemplated lifting the military’s ban on homosexuals, gay men and lesbians were characterized as “selfish and sexually predatory,” attributes that individuals claimed should preclude them from military service.<sup>320</sup> These stock characterizations, though, flew directly in the face of personal narratives that told a different story.<sup>321</sup> One Army Colonel testified that he had always worked with “excellent” homosexual soldiers, and that he had never witnessed any predatory behavior.<sup>322</sup> Such a narrative can be very compelling because it forces ingroup members to test their baseless, abstract propositions (i.e., pre-understandings) against concrete cases.<sup>323</sup> Discriminatory narratives, then, have historically infringed the rights of gays and lesbians. Clearly, gays and lesbians will benefit from replacing those narratives with their own.

Like other outgroups, gays and lesbians have begun to utilize storytelling to build community and persuade ingroups to depart from common perceptions and cease their proclivity to stereotype.<sup>324</sup>

314. *Id.* at 531.

315. *Id.* at 567.

316. 478 U.S. 186 (1986) (upholding a statute criminalizing homosexual sodomy), overruled by *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

317. See Henderson, *supra* note 272, at 1638-49 (detailing the background and legal arguments used in *Bowers*).

318. See, e.g., *id.* at 1642.

319. See Eskridge, *supra* note 276, at 614-15.

320. *Id.* at 615.

321. See *id.*

322. *Id.*

323. See *id.* at 615-16 (describing the story of a fifteen-year veteran who was “hounded out of the military”).

324. See Fajer, *supra* note 275, at 517-20.



Community-building is particularly important to the gay and lesbian community because of the effects of the closet.<sup>325</sup> The closet has a silencing effect on gay men and lesbians that precludes them from voicing their sexual orientation to others.<sup>326</sup> Hearing the coming out stories of others can help gay men and lesbians living in the closet to come out themselves and, thereafter, build solidarity from others' stories.<sup>327</sup>

Storytelling for persuasive purposes centers on the ability to subjectively and artfully shape and articulate a legal argument based on a certain factual situation. The narrative used is as important as the underlying argument itself: "[T]he key to achieving gay rights may lie not in the substance of the legal arguments, but in the way they are presented."<sup>328</sup> Presentation through storytelling allows the speaker to voice emotion, something that has been traditionally understood to be distinct from the law. A dichotomous approach to the law that views reason and emotion as separate is fundamentally flawed because it assumes emotion must play no part in thinking "legally":

The avoidance of emotion, affect, and experiential understanding reflects an impoverished view of reason and understanding . . . [that] stems from a belief that reason and emotion are separate, that reason can and must restrain emotion, that law-as-reason can and must order, rationalize, and control.<sup>329</sup>

Consequently, storytelling can be persuasive because it allows a speaker to bring a human element to an otherwise abstract legal argument.<sup>330</sup> The human side of a story creates a "common emotive ground" between the speaker and listener that can spur empathy.<sup>331</sup> At a more basic level, storytelling for gays and lesbians has "informational value" because it reminds the unaware or bigoted that gays and lesbians exist.<sup>332</sup> When ingroups are reminded of gays and

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325. *See id.* at 535.

326. *See id.* at 591-602.

327. *See id.*; *see also* Lin, *supra* note 22, at 748-49.

328. *See* Fajer, *supra* note 275, at 513. Professor Gerald P. López has argued that because we think about social interaction in story form, we inherently rely on "stock stories." Gerald P. López, *Lay Lawyering*, 32 UCLA L. Rev. 1, 3 (1984) (citation omitted). Because individuals have limited information, stock stories allow us to make decisions more efficiently. They allow us to carry on our interactions with others "without constantly having to analyze" our thoughts. *Id.* The lawyer's challenge is to recognize how people use stock stories and then learn how to manipulate them to one's advantage: "To solve a problem through persuasion of another, we therefore must understand and manipulate the stock stories the other person uses in order to tell a plausible and compelling story—one that moves that person to grant the remedy we want." *Id.*

329. *See* Henderson, *supra* note 272, at 1575-76.

330. *See* Fajer, *supra* note 275, at 521-22.

331. *Id.* at 521.

332. *See* Eskridge, *supra* note 276, at 614.

lesbians' existence and, more importantly, their inequitable treatment under the law, it becomes more difficult for ingroups to deny the costs of their policies.<sup>333</sup>

Lawmakers' responses to September 11, 2001 reflect the strong informational value of storytelling. The public, including legislators, heard powerful stories that humanized individuals' losses.<sup>334</sup> For example, Larry Courtney articulated to the public that despite living in a committed relationship with his partner for more than thirteen years, their relationship did not count as far as New York State was concerned.<sup>335</sup> As legal scholars have argued, the true and human side of a story often leads an ingroup, such as the New York State legislature, to change its ways.<sup>336</sup> When lawmakers were confronted with real victims' stories, they realized the inequity of applying arbitrary rules that produced inequitable results in real-life situations.

### B. *How Can Change Be Measured?*

Part I.C. discussed the changes in the treatment of same-sex couples stemming from September 11, 2001. Part II.A. defined storytelling and discussed how storytelling has been used by gays and lesbians to both build internal community and persuade and inspire those outside of their community to understand the legal problems they face. This section explores the question of how to measure the changes in treatment of same-sex couples after September 11, 2001. Because the legislation will be criticized as a one-time sympathetic act that does not signify any true fundamental change, legal scholars must attempt to understand whether the change really is fundamental and potentially long-lasting. Sociologists have explored this question and provided some insights.

How, for example, can scholars determine the extent of change and establish a causal relationship between potential factors and subsequent effects? Did the change stem from one particular factor, such as the terrorist attacks of September 11, 2001, or an aggregate of existing factors, including pre-September 11, 2001 gay rights victories in New York?<sup>337</sup> In other words, was the legislative response to September 11, 2001 one additional victory in a slow-moving line of victories? Or does it somehow stand apart and represent a more substantial victory than those smaller victories that came before it?

This inquiry is more difficult to undertake without the benefit of knowing the long-term consequences of the legislation in question.<sup>338</sup>

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333. *Id.*

334. *See, e.g.,* Worth, *supra* note 1.

335. *See id.*

336. *See supra* Part I.C.2.

337. *See e.g., supra* Part I.B.3.

338. *See* Joel F. Handler, Social Movements and the Legal System: A Theory of Law Reform and Social Change 36 (1978) ("Defining and measuring outcomes is

Indeed, this Comment can only forecast the legislation's future effects. Determining how social change is born, evolves, and how it can be analyzed, is a subject that social scientists have explored before in various contexts. Generally, social science literature addressing social change has bled into legal scholarship; in fact, there has been a call by legal scholars to utilize such literature to supplement legal scholarship.<sup>339</sup>

In sum, social scientists have found that identifying and measuring change is problematic. One commentator notes that "the measurement of change and its causal attribution present considerable methodological problems."<sup>340</sup> A wealth of literature dedicated to defining success approaches the problem in a number of ways, often focusing on particular social movements and their effects on the law.<sup>341</sup> One text providing a framework to measure change is particularly applicable to post-September 11, 2001 lawmaking.<sup>342</sup>

### 1. Defining Success: "New Advantages" and "Acceptance"

William Gamson's *The Strategy of Social Protest* provides a good starting point for this inquiry.<sup>343</sup> Professor Gamson studied fifty-three social movements and protest groups,<sup>344</sup> "challenging groups,"<sup>345</sup> who between 1800 and 1945 "challenged some aspect of the status quo."<sup>346</sup> His study analyzed each group's "target of influence," or the person or institution whose decisions or policies the challenging group sought

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further complicated . . . [where the subjects are] contemporary organizations . . . . In most cases, outcomes will have to be in the nature of a forecast and the theory will not be able to be validated."); Constance A. Nathanson, *Social Movements as Catalysts for Policy Change: The Case of Smoking and Guns*, 24 J. Health Pol. Pol'y & L. 421, 432 (1999) ("An additional problem arises in the case of ongoing social movements: how successful the movement appears depends on at what point in the movement's trajectory (unknownable, except in retrospect) success is measured.").

339. See Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. Pa. L. Rev. 1, 63 (2001) ("There is much to learn from social movements literature."). In addition to its application to other legal fields, Professor Rubin argues that social movement literature can shed new light on the "legal status of women . . . [as well as] the labor movement, the civil rights movement, the gay rights movement, and the children's rights movement." *Id.* at 79.

340. Nathanson, *supra* note 338, at 431.

341. See, e.g., William A. Gamson, *The Strategy of Social Protest* 28, 28-37 (1975) ("Success is an elusive idea."); Handler, *supra* note 338, at 34, 34-41 ("Defining organizational success is a difficult problem."); Mayer N. Zald & John D. McCarthy, *The Dynamics of Social Movements* 190 (1979) ("A particularly knotty problem in the study of social movements is how to assess their impact.").

342. See generally Gamson, *supra* note 341.

343. *Id.*

344. *Id.* at 19-22.

345. *Id.* at 14-18.

346. *Id.* at ix. The challenging groups represented a broad array of social movements and included the National Urban League, the American Birth Control League, the American Labor Union, the American Federation of Teachers, and the Communist Labor Party. *Id.* app. A, at 145-53.

to modify; the “target of mobilization,” or the “group’s constituency” or other individuals whom the group used to seek its change; and the “target of benefits,” or the beneficiaries of the changes being sought.<sup>347</sup> The study employed a set series of criteria applied to each group<sup>348</sup> to determine its “success,” which, admittedly, he recognized as “an elusive idea.”<sup>349</sup>

Gamson defined success as a set of outcomes: “one concerned with the fate of the challenging group as an organization and one with the distribution of new advantages to the group’s beneficiary.”<sup>350</sup> The former refers to whether the target of influence, or “antagonist,” accepts the challenging group in some manner “as a valid spokesman for a legitimate set of interests.”<sup>351</sup> The latter refers to a more tangible advantage gained by the group’s beneficiaries.<sup>352</sup> The response to both questions produces four possible outcomes ranging from “collapse,” or achievement of neither, to “full response,” or achievement of both.<sup>353</sup> Because he had the benefit of hindsight—tracking the entire arc of a challenging group’s rebellion—Professor Gamson’s analysis measured outcomes at the end of the challenge. As already noted, this Comment’s analysis does not have this benefit because the changes sought after September 11, 2001 are part of the greater ongoing challenge for same-sex couple rights.<sup>354</sup> While Gamson’s approach is a good starting point, one commentator has observed that, beyond Professor Gamson’s two-dimensional approach, “there is little consensus” on how to define success.<sup>355</sup> There are other methodologies, though, which lend credence to the validity of Gamson’s approach. One similar dichotomous approach splits the types of success between “symbolic rewards” and “tangible

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347. *Id.* at 14-16.

348. *Id.* at 24-27. The questionnaire was comprehensive. It included a group of questions that sought to determine how the challenging group interacted with “the law enforcement system, government agencies, mass media, political parties, legislative bodies, and private interest groups.” *Id.* at 25. The survey further analyzed the challenging groups’ internal characteristics, such as “its leadership, organizational structure, resources, tactics, [and] ideology.” *Id.* It further evaluated the attributes of each challenging group’s constituency and their relationship to the greater challenging group. *Id.* app. C, at 172-75.

349. *Id.* at 28.

350. *Id.*

351. *Id.*

352. *Id.* at 28-29. The example of a “new advantage” that Professor Gamson then provides—which is particularly apropos for this inquiry—is “the passage of the legislation that [the group] desired.” *Id.* at 29.

353. *Id.* The intermediary levels are “preemption” and “co-optation.” *Id.*

354. Alternatively, if one views the post-September 11, 2001 advocacy for same-sex couples as a discrete event, it can be viewed as achieving “full response,” in that “new advantages” were gained through the resulting legislation. *See supra* Part I.C. Moreover, “acceptance” was also achieved as evidenced implicitly by passage of the legislation and explicitly by the commentary accompanying it. *See supra* notes 222, 231.

355. Nathanson, *supra* note 338, at 431.

rewards," such as goods and services.<sup>356</sup> Tangible rewards can consist of: "tangible benefits such as better health, education, and welfare programs . . . . For consumer groups, tangible benefits would mean safer and more economical products . . . for minorities, the enjoyment of civil rights, jobs, and so forth."<sup>357</sup> Under this framework, tangible rewards are the analog of new advantages in the Gamson schema.

## 2. The Role of Political Opportunities

Sociologists have also argued that discrete political opportunities, rather than more "persistent social or economic factors," have the potential to produce greater social change.<sup>358</sup> Such opportunities are defined broadly to include longer-lasting events, such as booming economies.<sup>359</sup> For example, it has been argued that the anti-war movement and other social movements of the 1960s relied on anti-material ideologies that were triggered by the United States' rising affluence.<sup>360</sup> Similarly, labor strikes are more likely in robust economies than in depressive ones because higher demand for workers gives them more leverage and political clout.<sup>361</sup>

More dramatic events also spur change: "major new policies of government come about through broad changes in public opinion usually caused by dramatic events (wars, depressions, etc.), extraordinary leadership, or the accumulation of ideas filtered through the media."<sup>362</sup> Under this viewpoint, a social reform group's role is more limited; it can "put[] ideas on the national agenda, but organizations cannot bring about such change on their own."<sup>363</sup>

Professor Gamson hypothesized that external crises, such as "a foreign war or natural disaster," should empower challenging groups because their targets in the political system are less equipped to turn back the challenge.<sup>364</sup> His theory was essentially an economic one: the crisis results in the State having fewer resources to allocate to "control a challenging group if necessary."<sup>365</sup> Applying his theory to the sample of 53 challenging groups, he found that "challenging groups that began their challenge in quiet times . . . do neither better nor worse than their brethren [who begin] in turbulent times."<sup>366</sup>

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356. See Handler, *supra* note 338, at 36-37.

357. *Id.* at 36.

358. See Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics* 71 (2d ed. 1998).

359. *Id.* at 72-73.

360. See *id.* at 77.

361. *Id.* at 72-73.

362. Handler, *supra* note 338, at 39.

363. *Id.*

364. See Gamson, *supra* note 341, at 111.

365. *Id.* ("It frequently becomes more convenient to yield than to divert precious resources from an already strained system for purposes of social control.").

366. *Id.* at 112.

However, Gamson then analyzed the success of social movements already begun prior to a crisis and found that “crisis is an aid to those challengers who have already launched their effort and have sustained it, although without results, up to the time of the crisis.”<sup>367</sup>

While scholars may debate whether the movement for same-sex relationship recognition has been entirely “without results” prior to September 11, 2001, the post-September 11th results are certainly significant relative to prior results. The resulting conclusion is that where the challenge is not part of the crisis itself, as is the case here because the fight for same-sex relationship recognition was not born on September 11th, government is forced to manage other, more pressing challenges.<sup>368</sup> The result is a normalization between the antagonist and the challenging group, and a postponement of demands in exchange for the promise of future advantage.<sup>369</sup> One September 11th-related example of an ongoing challenge affected by the terrorist attacks is the argument that foreign policy and criminal law changed dramatically with the ensuing war on terrorism.<sup>370</sup> Specifically, shifts in foreign policy and criminal law “while momentous, w[ere] not entirely sudden”<sup>371</sup> and that the seeds for such changes were planted in responses to the 1993 World Trade Center bombing and the 1998 American Embassy bombing in Africa.<sup>372</sup> The political opportunities doctrine has been used in many contexts; one analogue to September 11, 2001 provides additional support that the legislative response to September 11, 2001 is not unfounded, and that its effects may, in hindsight, prove to be considerable.

### 3. Analogue

A brief discussion of one other social movement provides an effective way to look at the application of the social science literature and begin to hypothesize about the application of the post-September 11, 2001 laws. The anti-smoking movement and its effects on

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367. *Id.* at 114.

368. *Id.*

369. *Id.*

370. See Comment, *Responding to Terrorism: Crime, Punishment, and War*, 115 Harv. L. Rev. 1217 (2002). The author argues that our foreign policy “substantially changed in the aftermath of the attacks [with] [t]he so-called ‘Bush Doctrine’—which treats states that harbor terrorists on par with the terrorists themselves.” *Id.* at 1227. Furthermore, the policy transformed our criminal justice system because it was not used: “[T]he response to September 11 has, thus far, taken place largely outside the criminal justice system. . . . Whatever form of justice is at work here, it is not the traditional form of criminal justice the United States has [previously] applied in addressing terrorism.” *Id.* at 1226-27.

371. *Id.* at 1228.

372. *Id.* at 1228-29. The author argues that, while the magnitude of the 9/11 attacks sets it apart, the “elements of the current response can be found in past responses, but they did not coalesce into a coherent doctrine until September 11.” *Id.* at 1228.

policymaking highlight the importance of political opportunities.<sup>373</sup> One author argues that there had been no grassroots anti-smoking movement before 1964 when the Surgeon General issued a report exposing the dangers of smoking. The report "was the opportunity that threw a monkey wrench into this system by creating openings for dissident individual members of Congress [and] federal agencies unconnected with the tobacco subsystem."<sup>374</sup> The report clearly became a political opportunity.

Thereafter, federal agencies, benefiting from their independence from the targets of challenge, e.g., Congress,<sup>375</sup> began anti-smoking initiatives, including the requirement imposed on tobacco companies to include package warnings.<sup>376</sup> A parallel in New York is the New York State workers' compensation<sup>377</sup> and crime victims boards,<sup>378</sup> and Kenneth Feinberg, the Special Master of the FVCF.<sup>379</sup> While not regulatory agencies, they maintain more autonomy than legislatures and, consequently, play important roles to the same-sex partners of September 11, 2001. Their decision making with respect to same-sex couples can provide at least symbolic precedent for future policymaking and, while their hands are tied to a degree by statute, each has significant latitude in determining whether a same-sex relationship is eligible for its respective payment.<sup>380</sup>

#### 4. Disaster Relief

Congress has shown "an increasing willingness to deal with personal injury claims when there is a 'disaster.'"<sup>381</sup> The most immediate example is Congress's passage of the Air Transportation Safety and Stabilization Act, and its Federal Victims Compensation Fund, in response to the September 11, 2001 terrorist attacks.<sup>382</sup> Federal legislation following disasters has, of course, not been limited to the issue of personal injury claims.<sup>383</sup> The nature of such post-disaster legislation has been examined before and is beneficial to this post-September 11, 2001 legislation inquiry.

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373. See Nathanson, *supra* note 338, at 466-75.

374. *Id.* at 467.

375. *Id.* at 467-68.

376. *Id.* at 425.

377. See *supra* Part I.C.2.d.

378. See *supra* Part I.C.2.a.

379. See *supra* Part I.C.1.a.

380. See *supra* Parts I.C.2.a. (Crime Victims Board), I.C.2.d. (Workers' Compensation), I.C.1.a. (FVCF).

381. Georgene Vairo, *Remedies for Victims of Terrorism*, 35 Loy. L.A. L. Rev. 1265, 1292 (2002).

382. See *supra* Part I.C.1.a.

383. See, e.g., Jay Schoenfarber, Comment, *Capitalizing on Environmental Disasters: Efficient Utilization of Green Capital*, 9 Tul. Envtl. L.J. 147 (1995). For instance, the Oil Pollution Act of 1990 was passed in response to the Exxon Valdez spill. *Id.* at 150-53.

a. *Post-Disaster Relief Depends on Blameworthiness and Uniqueness*

One commentator has argued that, beginning in the eighteenth and early nineteenth century, the federal government has traditionally awarded post-disaster relief based on an individual's ability to present a narrative of moral blamelessness and fate.<sup>384</sup> She argues that the government differentiated between victims of self-imposed poverty and victims of disasters that could not have been anticipated. So, the unemployed were looked upon as lazy and unworthy of relief whereas victims of earthquakes or floods were viewed as morally blameless.<sup>385</sup> According to Landis, the distinction could be difficult to make, as exemplified by cases where the government viewed victims of American Indian attacks as responsible for their fate because they physically placed themselves in vulnerable positions by living near the American Indians.<sup>386</sup> She further argues that "[t]he concern most often articulated by members of Congress in opposition to granting relief was fear of setting a precedent."<sup>387</sup>

One commentator has argued that governmental relief is more likely for "unique" disasters.<sup>388</sup> More specifically, it is difficult to rationalize governmental compensation for a single victim in a discrete accident, but it is more plausible to offer relief to a larger set of unique victims.<sup>389</sup> The uniqueness, he argues, is less threatening to taxpayers who won't anticipate paying out again in the future.<sup>390</sup> Recurring disasters, such as crop failures or floods, do not evoke the same degree of sympathy because victims can plan, primarily through insurance, for future calamities.<sup>391</sup>

b. *Criticisms of Post-Disaster Relief*

Economic theorists have argued that constituents often demand, and lawmakers acquiesce in creating, legislation based on "their judgments about the probabilities associated with certain harmful activities."<sup>392</sup> They argue that individuals often misforecast the risk to be regulated based on their subjective idea of the harm's

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384. Michele L. Landis, "Let Me Next Time Be 'Tried by Fire': Disaster Relief and the Origins of the American Welfare State 1789-1874, 92 Nw. U. L. Rev. 967, 988-98 (1998).

385. *Id.* at 978-81.

386. *Id.* at 1018.

387. *Id.* at 998.

388. Saul Levmore, *Coalitions and Quakes: Disaster Relief and Its Prevention*, 3 U. Chi. L. Sch. Roundtable 1, 3-6 (1996).

389. *Id.* at 4-6.

390. *Id.*

391. *Id.*

392. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1518 (1998).



availability.<sup>393</sup> One area where this is prevalent is in the context of environmental legislation, where the miscalculation of harm “encourages the well-known ‘pollutant of the month’ syndrome, where regulation is driven by recent and memorable instances of harm.”<sup>394</sup> Two important factors in the perception of the availability of an environmental harm are “the observed frequency of the hazard and its salience.”<sup>395</sup> Analogizing to September 11, 2001, the frequency element is not present, but the salience is undeniably high.

One law that was highly criticized because of this misforecasting was the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),<sup>396</sup> or “Superfund,” a federal law designed to regulate hazardous waste sites<sup>397</sup> which was passed primarily in reaction to the waste site located at Love Canal, New York.<sup>398</sup> 21,000 tons of chemical waste made its way into the canal via the site between 1943 and 1952, thereby increasing serious health risks, including cancer.<sup>399</sup> As a result, it received tremendous media coverage and national attention. However, the criticism emphasizes that any serious health risk remains unproven, but that because it was “played up and dramatized by the media and other actors, [it] produce[d] a legislative response.”<sup>400</sup>

Professor Cass Sunstein criticized the Superfund and has further argued that “[a] good deal of legislation and regulation can be explained partly by reference to probability neglect when emotions are running high.”<sup>401</sup> He defines “probability neglect” as a person’s instinct to focus on a potentially adverse outcome, and not its low probability of occurrence, when intense emotions are engaged. One example he uses is the high degree of concern over flying post-

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393. *Id.*

394. *Id.*

395. *Id.* at 1519.

396. 42 U.S.C. §§ 9601-9675 (2000).

397. See Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy* 288 (2d ed. 1996).

398. See Jolls et al., *supra* note 392, at 1521.

399. See generally N.Y. State Office of Pub. Health, N.Y. State Dep’t of Health, *Love Canal: A Special Report to the Governor & Legislature* (1981) (reporting on the post-Love Canal toxicological investigation, relocation of residents from the site, subsequent litigation and orders issued by the New York State Health Department); N.Y. State Office of Pub. Health & Governor’s Love Canal Inter-Agency Task Force, *Love Canal: Public Health Time Bomb, A Special Report to the Governor and Legislature* (1978) (reporting on the results of environmental and epidemiological testing at Love Canal); Adeline Gordon Levine, *Love Canal: Science, Politics, and People* (1982) (providing a comprehensive overview of the history of Love Canal); Symposium, *The 20th Anniversary of Love Canal: Lessons Learned*, 8 *Buff. Env’tl. L.J.* 171 (2001) (reflecting on Love Canal’s long term effects on science and health research, public policy, industrial policy and environmental social movements).

400. Jolls et al., *supra* note 392, at 1522.

401. Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 *Yale L.J.* 61, 98 (2002).

September 11, 2001 where such fears, which greatly supersede the actual probability of similar disaster, impose great costs.<sup>402</sup> While probability neglect probably does not extend to the post-September 11, 2001 legislation because it is not geared to mitigate the risk of similar disaster in the future, the contention that interest groups often exploit disasters to create new legislation has been seen in the remarks of Louis Sheldon and others,<sup>403</sup> and supports their hope that the change is one-time only.

Similarly, another commentator has argued that people tend to underestimate a relatively high-probability risk or to overestimate a relatively low-probability risk.<sup>404</sup> Consequently, interest groups and politicians prey on constituents' fears by legitimizing legislation that addresses a risk that will most likely not occur again. He states, by example, that in the financial services industry regulations that follow disasters bear no relation to the remedy needed to respond to the disaster; instead, the legislation usually is intended to satisfy a narrow interest group.<sup>405</sup> Additionally, he argues that "[a]nother captivating insight from the literature on social psychology is that people appear to have a fairly strong sense of innate fairness."<sup>406</sup> Applied here, the post-September 11, 2001 legislation may reflect our legislators' idea of what is fair.

### III. SEPTEMBER 11, 2001 CATALYZED A LEGAL RECOGNITION OF SAME-SEX COUPLES THAT IS SUGGESTIVE OF FUTURE RECOGNITION

The United States has experienced other tragedies, including terrorist attacks on U.S. soil.<sup>407</sup> Further, domestic partnership advocates and gay rights activists in general have been faced with other events in the past that directly affected gays, lesbians and their families, often with extraordinary responses<sup>408</sup> and others with little or no response at all.<sup>409</sup> However, the changes after September 11, 2001

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402. *Id.* at 100.

403. *See supra* notes 263-68 and accompanying text.

404. Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 Cornell L. Rev. 280, 299-301 (2002).

405. *Id.* at 300.

406. *Id.* at 301.

407. *See generally* Brent L. Smith, *Terrorism in America: Pipe Bombs and Pipe Dreams* 17-30 (1994).

408. *See, e.g., supra* Part I.B.3.a.

409. For example, after the brutal murder of Mathew Shepard there was a great push for federal hate crime legislation that includes hate crimes based on sexual orientation. *See generally* Christopher Chorba, Note, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 Va. L. Rev. 319 (2001). Federal legislation was never passed, and on the fifth year anniversary of Shepard's murder, the Local Law Enforcement Enhancement Act, which would allow for prosecution of hate crimes based on sexual orientation, is pending in Congress. *See* Press Release, The Human

depart from precedent. Part II.A. discussed the role of storytelling in legal scholarship and how the voicing of personal narratives has played a large role in persuading third parties to understand the kinds of injustices same-sex couples face, and to further persuade them that these inequities must be changed.<sup>410</sup> September 11, 2001 played such a role. The attacks exposed stories of committed couples that lived lives together just like married heterosexual couples.<sup>411</sup> The problems these couples faced in the wake of the tragedy amount to the same problems faced by married couples.<sup>412</sup> The only difference is that for the former, remedies were nonexistent.<sup>413</sup> These stories brought a human element to the arguments traditionally made in seeking equal treatment under the law.<sup>414</sup> In New York, lawmakers responded.<sup>415</sup> Part II.B. discussed frameworks employed by social scientists to evaluate social change and how social change can be spurred by certain unique events, such as disasters. The storytelling scholarship and frameworks introduced in Part II are used in this part to analyze the legislative events following September 11, 2001.<sup>416</sup> They demonstrate that September 11, 2001 told a powerful story that had not been told before. That story resulted in legislation marking a significant change in the perception and treatment of same-sex couples. These changes are likely to become more than a minor victory, and will hopefully lead to additional victories in the future. Subsequent developments since September 11, 2001 support this argument.

### A. *Storytelling and Social Change*

The social change literature and storytelling scholarship introduced in Part II provide an instructive lens through which to view the post-September 11, 2001 legislation in question.<sup>417</sup> The social change literature sets the framework: Under Gamson's framework, challenging groups are those that are trying to challenge the status quo.<sup>418</sup> They seek "new advantages" for their beneficiaries.<sup>419</sup> The

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Rights Campaign Foundation, HRC Urges Congress to Pass Local Law Enforcement Enhancement Act on 5th Anniversary of Mathew Shepard's Death (Oct. 14, 2003), at [http://www.hrc.org/Template.cfm?Section=Local\\_Law\\_Enforcement\\_Enhancement\\_Act&CONTENTID=10564&TEMPLATE=/ContentManagement/ContentDisplay.cfm](http://www.hrc.org/Template.cfm?Section=Local_Law_Enforcement_Enhancement_Act&CONTENTID=10564&TEMPLATE=/ContentManagement/ContentDisplay.cfm).

410. See *supra* Part II.A.

411. See, e.g., Worth, *supra* note 1.

412. *Id.*

413. *Id.*

414. See generally *supra* Part II.A. (discussing storytelling's ability to expose a human element to legal argument).

415. See *supra* Part I.C.2.

416. See *supra* Part I.C.

417. While this Comment cannot undertake Gamson's full analysis, I believe a cursory application is fruitful.

418. See *supra* text accompanying notes 345-46.

challenging group clearly consists of those gay rights' organizations—most prevalently Lambda Legal and the ESPA—who sought both “new advantages,” i.e., legislation, and general “acceptance” from New York lawmakers for their constituency, the same-sex partners of victims of September 11, 2001.<sup>420</sup> Targets of influence are those individuals, groups, or institutions being challenged.<sup>421</sup> The “target of influence” is the set of lawmakers, state and federal, targeted by the challenging group, and the beneficiaries are the same-sex partners of victims. While “acceptance” appears to be more conceptual and, thus, the more difficult component to measure, Professor Gamson states that it involves “a change from hostility or indifference to a more positive relationship.”<sup>422</sup> Surely Governor Pataki's comments recognizing all victims of September 11, 2001, which ring of inclusion and acceptance,<sup>423</sup> qualify as a movement from indifference to a more accepting relationship. Arguably, the reactions of individuals like Rev. Jerry Falwell, Pat Robertson, and Louis Sheldon that followed September 11, 2001<sup>424</sup> signify a greater “hostility or indifference” toward the same-sex partners of victims. Surely, though, the legislation speaks louder than the antagonistic remarks of the few.<sup>425</sup> Further, Jerry Falwell retracted his remarks.<sup>426</sup> The other component, “new advantages,” which were won are clear: the series of laws and Executive Orders treating same-sex couples equally to married couples.<sup>427</sup>

A “tangible reward” is another term, analogous to Gamson's “new advantage,” that is used to define the concrete benefits that a challenging group can win.<sup>428</sup> Under the post-September 11, 2001 legislation in New York State, tangible rewards consist of the workers' compensation benefits, crime victims' awards, and payouts under the FVCF. The theory clarifies that the “success” of the award of such goods and services is not realized upon passage of the legislation; rather, “success” comes when the goods and services are actually redeemed. Those who do not collect (for whatever reason) are

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419. See *supra* text accompanying note 350.

420. For examples of both groups' involvement, see, for example, *supra* notes 178, 197, 206, 222 and accompanying text. Further evidence of the importance of September 11, 2001 to same-sex couples, and the importance of the Lambda Legal Defense Fund's role, is evidenced by its website: “September 11” is one of the 19 listed “Issues” affecting gays and lesbians. Lambda Legal Defense Fund, Issues, at <http://www.lambdalegal.org/cgi-bin/iowa/issues> (last visited Apr. 4, 2004).

421. See text accompanying *supra* note 347.

422. Gamson, *supra* note 341, at 31.

423. See *supra* note 222.

424. See *supra* notes 263-66 and accompanying text.

425. See *supra* note 262.

426. See *supra* note 267.

427. See *supra* Part I.C.

428. See Handler, *supra* note 338, at 36.

examples of failure.<sup>429</sup> Consequently, only the beneficiaries can subvert the law's "success."

Symbolic rewards, likened to Gamson's "acceptance," can be just as important as goods and services because they have the potential to act as more enduring victories.<sup>430</sup> While the tangible rewards granted through the New York State legislation are undeniably substantial, there can be further reaching symbolic rewards because "[s]ometimes the law sharpens perceptions and acts as an educator or moral persuader."<sup>431</sup> The legislation's potential to act as an "educator or moral persuader" is twofold: it can educate the citizenry about same-sex couples' difficulties, inducing them to help, and it can further educate lawmakers and policymakers that the sky will not fall if same-sex couples are recognized as equal to opposite-sex couples.<sup>432</sup>

The law's ability to act as a moral persuader and educator is supported by storytelling's message that personal narrative has a persuasive function that provides "informational value" to the ignorant.<sup>433</sup> In the present context, the most basic information that September 11, 2001 imparted on the citizenry is that same-sex couples are real couples that inhabit the same cities, towns, and workplaces as heterosexual couples. While this may seem obvious to some, advocates of storytelling emphasize that ingroups' narratives dominate our thinking to the extent that outgroups' voices are simply not heard.<sup>434</sup> Some may willfully ignore the needs of same-sex couples while others may acquiesce with the ingroup's narrative and assume everyone is fairly governed by our law.

September 11, 2001, then, told a number of stories that informed the public, and propelled lawmakers to act humanely. One story is that many same-sex couples live monogamous, marriage-type lives that are indistinguishable from couples who actually are allowed to marry. Indeed, the legislative support for the September 11th Victims and Families Relief Act recognized the need for relief to all "committed couples," not just those that were married.<sup>435</sup> National news media picked up on these stories and brought them to citizens who, without a tragedy such as September 11, 2001, may not have heard them.<sup>436</sup> Such stories fly in the face of the traditional narrative

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429. *Id.* at 37.

430. *See id.*

431. *Id.*

432. One historian argues that in cities it is difficult for a disaster to significantly alter deeply entrenched societal patterns. However, she argues that disasters provide opportunities for a government and its citizenry to honestly evaluate how they responded to "social obligations and . . . social needs—in ordinary times." Karen Sawislak, *September 11 and New York City: Patterns of Urban Disaster in the United States*, 34 *Urb. Law.* 599, 607 (2002).

433. *See supra* Part II.A.

434. *See supra* Part II.A.

435. *See supra* Part I.C.2.b.

436. For example, Larry Courtney's story was reported by the *New York Times* and

that gays and lesbians are over-sexualized beings incapable of marrying and parenting.<sup>437</sup> The fact that such stories focused on couples and family lives, rather than sexual conduct, may be a reason why lawmakers were willing to extend certain rights and privileges. Ingroup members were exposed to couples who led lives parallel to their own—the kind of lives that have financial concerns, like whether a partner will be compensated in the event he or she is injured or killed on the job.<sup>438</sup> These stories allowed ingroup members to analogize their own lives to those of the affected same-sex couples.

Once people understood that same-sex couples do in fact exist, a narrative of gay invisibility under the law surfaced. Larry Courtney's inaccessibility to workers' compensation payments appeared patently unjust, given the length and nature of his relationship with his deceased partner.<sup>439</sup> It is likely that lawmakers understood this, at least to a greater extent than they had before. The rationale is that when people can empathize with another's problem, they are more likely to respond as if they were facing the problem themselves.<sup>440</sup> The storyteller's goal is to convince the listener that he or she could have been the same victim. Generally, stories create empathy by convincing the listener that he or she is like the subject of the story in some significant way—often through a shared experience of a powerful emotion or an important event.<sup>441</sup> Surely, September 11, 2001 served this purpose because those unaffected by the tragedy directly realized how they very easily could have been affected. The survivors' stories rang of commonality. As storytelling scholarship teaches, persuasive narratives such as these involve highlighting similarities and de-emphasizing difference.<sup>442</sup>

Advocates of storytelling argue that the human side of a narrative plays a strong part in determining the persuasiveness of an argument. It is clear that September 11, 2001 brought to light many stories, all of them human and compelling.<sup>443</sup> These stories surely impacted the public, including lawmakers. However, questions remain as to the degree of influence the stories had. Lawmakers were certainly influenced to a degree. For example, both Governor Pataki himself and the New York State Crime Victims Board invoked the need to

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other news outlets. *See supra* note 1 and accompanying text. Mark Bingham, one of the passengers on United Airlines Flight 93 who attacked the hijackers, thereby avoiding a collision in Washington D.C., was widely celebrated as a hero in an article in the *New York Times*. Nieves, *supra* note 260. The *Advocate* named him person of the year, and he was eulogized by Senator John McCain. *Id.*

437. *See supra* Part II.A.2.

438. See the discussion of workers' compensation in New York, *supra* Part I.C.2.d.

439. *See supra* note 2 and accompanying text.

440. *See Fajer, supra* note 275, at 521.

441. *Id.* (citation omitted).

442. *Id.* at 523.

443. *See, e.g.,* Worth, *supra* note 1.

recognize "committed relationships" when they took the steps they did after September 11, 2001.<sup>444</sup> Because gay rights advocates had been telling similar stories in the past,<sup>445</sup> many will argue that lawmakers did not suddenly become empathetic. Instead, some will argue that the lawmaking that occurred constitutes a political concession that does not represent any real change in treatment. The next section deals with these questions of causation and goes on to discuss the likelihood of future victories.

*B. Causation, the Use of Political Opportunities, and the Potential Effects of Post-September 11, 2001 Legislation*

Because the legislation is designed to compensate the same-sex partners of victims of September 11, 2001, it is logically a response to that day's terrorist attacks. However, the post-September 11, 2001 challenge that spurred the legislation did not occur in a vacuum; the fight for same-sex relationship recognition began in the decades preceding September 11, 2001 and, thus, set the stage for these victories.<sup>446</sup> Consequently, a question remains as to what role the ongoing factors preceding September 11, 2001 played and how they interacted with the terrorist attacks to spur the legislation.

While the determination of causal relationships is difficult, it is clear that multiple factors can play a role. Potential factors have been defined as "inputs from the social environment in the form of demands of conflicting interests affected by social change seeking recognition."<sup>447</sup> Here, the set of social environment inputs preceding September 11, 2001 is large and includes, for example, the consistent judicial and legislative challenges explored in Parts I.A. and I.B. The primary social input following the attacks was the advocacy of gay and lesbian rights groups such as the ESPA and Lambda Legal. With respect to the passage of the amendment of the New York State Workers' Compensation Law, the primary input was a request made to New York State Assemblymember Catherine Nolan from a constituent who lost a same-sex partner.<sup>448</sup> That request acted as a stimulus to Assemblymember Nolan to introduce and sponsor the law. The inputs are then "converted" into output through "the interactive and decisional behavior of the policy-making actors in the system, e.g.,

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444. See *supra* notes 222 (Pataki), 224 (CVB).

445. For example, arguments made in the *Braschi* trial focused on the commitment of same-sex couples. See *supra* Part I.B.3.a.

446. See generally *supra* Parts I.A.-B.

447. C. Thomas Dienes, *Judges, Legislators, and Social Change*, in *Law and Social Change* 33-34 (Stuart S. Nagel ed., 1970) (citations omitted).

448. In a conversation with Assemblymember Catherine Nolan's legislative counsel, she indicated that Chapter 467 was spurred by this constituent's request. Telephone Interview with Gerry Reilly, Counsel, Assemblymember Catherine Nolan (Nov. 21, 2002).

legislature and judiciary.”<sup>449</sup> The study of social movements shows us that when multiple inputs are present, triggering events, such as political opportunities can act to catalyze them to greater change.<sup>450</sup> It is clear that the challenging group had already launched its challenge prior to September 11, 2001.<sup>451</sup> The ongoing advocacy of groups such as Lambda Legal and ESPA set the stage for responding to an external event, September 11, 2001.

Nonetheless, many will argue that while the desire to compensate victims of September 11, 2001 did indeed catalyze a change in treatment of same-sex couples, the change was minimal. Indeed, the laws only compensate a small group of survivors of victims of a discrete event, so its immediate effect does not reach that far.<sup>452</sup> Others will also argue that any other reaction by legislators would have been political suicide. In the wake of such a tragedy, legislators had no other option but to act as they did. This argument, though, ignores the fact that past events, which could have spurred serious change, did not. For example, the murder of Mathew Shepard, which received national attention, has not led to federal hate crimes legislation, notwithstanding a strong push to have such legislation passed.<sup>453</sup> While it’s difficult to “compare” one tragedy to another, September 11, 2001 differs in the number of people affected and its impact on the American psyche. September 11, 2001 also differs in that it affected both heterosexual and same-sex couples at the same time. People can identify more easily with September 11, 2001 because they could have been affected, whereas, sadly, many who are not gay feel little connection to the victim of a hate crime based on sexual orientation. September 11, 2001 is therefore unique because it spurred a common empathy—one that “can forge bonds.”<sup>454</sup>

The nature and “uniqueness” of the September 11, 2001 attacks also sets it apart from prior events and helps explain why the narratives that followed were so effective.<sup>455</sup> Storytelling scholarship demonstrates that the effectiveness of a legal argument often times lies in the narrative that the speaker presents.<sup>456</sup> Individuals used the uniquely human elements of September 11, 2001 to tell particularly compelling stories about same-sex couples. Specifically, these stories evoked sympathy for those who did not, or could not, plan for the attacks. This narrative of blamelessness conflicts with the traditional narrative that gays and lesbians deserve any inequity they face

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449. Dienes, *supra* note 447, at 34.

450. *See supra* Part II.B.2.

451. *See generally* Parts I.A.-B.

452. This excludes the Crime Victims’ Board amendment, which will now include same-sex partners in all future awards. *See supra* Part I.C.2.a.

453. *See supra* note 409.

454. *See* Fajer, *supra* note 275, at 521.

455. *See supra* Part II.B.4.a.

456. *See supra* Part II.A.



because they have chosen their sexuality.<sup>457</sup> While the survivors of same-sex partners were invisible under the law because they “chose” their relationship, they did not choose to lose a partner any legal recognition from the state. Some may argue that their plight still remains a product of choice, but it is a more attenuated result from “choice,” and this makes it easier for lawmakers to accept. In sexual conduct cases, for instance, courts are more apt to deny relief because gays and lesbians are viewed as willfully choosing to engage in sexual conduct. In contrast, while victims of the attacks “chose” their relationships years prior, they did not choose, nor could they have planned for, a terrorist attack. This allowed people to view the victims, including gay victims, as morally blameless for the attacks. Through this lens, then, while certain victims chose their partners, they did not choose the attacks and its consequences, and did not choose to be denied spousal-type benefits. While causation in this context is difficult to prove, the salience of the World Trade Center attacks and the personal narratives that followed are strong evidence that significant change has occurred.

First, New York State’s passage of the Sexual Orientation Non-Discrimination Act (“SONDA”)<sup>458</sup> on December 17, 2002 happened a little more than one year after the September 11, 2001 attacks. In passing SONDA, New York became the thirteenth state to outlaw discrimination based on sexual orientation, which now applies to housing, employment, public accommodation, education, and credit. Of particular interest, the bill was originally introduced in 1971; it was suddenly passed after thirty-one years of consistent lobbying and advocacy. Gay rights groups’ pointed to legislators’ post-September 11, 2001 actions as an impetus for the subsequent passage of SONDA.<sup>459</sup>

In April, 2003, the New York Supreme Court, Nassau County, held that the same-sex survivor of a deceased spouse, whose underlying relationship had been solemnized under Vermont’s civil union statute, had standing to bring a wrongful death claim against the hospital in which he died.<sup>460</sup> The Court fashioned its decision in part by analogizing the dispute to prior New York state cases, such as *Braschi*,<sup>461</sup> where a statutory right previously unavailable to same-sex

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457. Professor Fajer argues that gay men and lesbians are portrayed as embodying “sex-as-lifestyle,” which supports the notion that this lifestyle is chosen. See Fajer, *supra* note 275, at 537-46.

458. 2002 N.Y. Laws 2 (codified at N.Y. Exec. Law § 292(27), 296 (McKinney Supp. 2004)).

459. See *supra* note 207 and accompanying text.

460. *Langan v. St. Vincent’s Hosp.*, 765 N.Y.S.2d 411 (Sup. Ct. 2003). See Part I.A.3. for a general discussion of a same-sex survivor’s historic inability to bring a wrongful death action.

461. 543 N.E.2d 49 (N.Y. 1989). For a discussion of *Braschi*, see Part I.B.3.a.

couples was extended to them through a court's equity powers.<sup>462</sup> In coming to the result that New York should recognize Vermont's civil unions for the purpose of wrongful death actions, the Court noted the rights registered New York City domestic partners were entitled to, including those available to survivors of September 11, 2001.<sup>463</sup> More generally, the Court recognized that New York's treatment of same sex couples reflects, at least in part, the fact that "public opinion regarding same-sex unions is evolving."<sup>464</sup> The decision of greatest importance in this context is *Lawrence v. Texas*,<sup>465</sup> which held a Texas sodomy law prohibiting certain sexual acts between member of the same sex to be unconstitutional and, in turn, struck down *Bowers v. Hardwick*.<sup>466</sup> The significance of the decision for same-sex couples was heightened by the Court's apologetic and highly respectful tone toward gay men and lesbians—one arguably unseen in any of its prior jurisprudence on the subject.<sup>467</sup> While sociologists concede that projecting the long-term effects of certain events on long-term social causes is a difficult task and an inexact science,<sup>468</sup> the gay rights victories immediately following September 11, 2001, coupled with those victories since, appear to represent a significant turn.

### CONCLUSION

The purpose of this Comment has been to explore the perception and legal treatment of same-sex relationships in New York specifically, and the United States generally, in the aftermath of the September 11, 2001 terrorist attacks. Same-sex couples were traditionally ignored in New York in a number of important ways; however, in the wake of September 11, 2001 that treatment changed dramatically. This Comment explored the question of why legislators acted as they did after September 11, 2001 and the potential for future change. The analysis shows that dramatic events can serve as catalysts for social reform. Similarly, the use of storytelling to advance rarely heard perspectives is a device that outgroups have traditionally used.

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462. *Langan*, 765 N.Y.S.2d at 415.

463. *Id.* at 416.

464. *Id.* at 420. The Court went on to state: "[I]t is impossible to justify, under equal protection principles, withholding the same recognition from a union which meets all the requirements of a marriage in New York but for the sexual orientation of its partners." *Id.* at 420-21.

465. 123 S. Ct. 2472 (2003).

466. 478 U.S. 186 (1986).

467. *Lawrence*, 123 S. Ct. at 2484 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."). Fearing that the ruling will open up the door to a judicial grant of same-sex marriage, conservatives have come together to propose a constitutional amendment defining marriage as a relationship solely between a man and a woman. See Alan Cooperman, *Sodomy Ruling Fuels Battle over Gay Marriage*, Wash. Post, July 31, 2003, at A1.

468. See *supra* text accompanying note 340.

After September 11, 2001, the same-sex survivors of victims told compelling stories that changed the way others viewed them. While emotions run high in the wake of disasters, and consequently may skew legislators' policymaking, resulting policies should not be dismissed as merely reactive.

Now that New York has broadened its legal recognition of same-sex couples, it begs the question of whether New York, other state governments, and the federal government will seek to, or whether it will even be able to, turn back the clock.<sup>469</sup>

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469. Cf. William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419, 453 (2001) ("The effect of the Supreme Court's decisions is impossible to calibrate exactly, but it surely contributed to mass mobilization (as well as vice versa).").